86-942

No. .....

Supreme Court, U.S.
FILED
DEC 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1986

RHODE ISLAND PUBLIC UTILITIES COMMISSION,
NEW JERSEY BOARD OF PUBLIC UTILITIES,
Cross-Petitioners,

v.

METROPOLITAN TRANSPORTATION AUTHORITY,
Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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48 pp

QUESTION PRESENTED

Did the Court of Appeals err in determining that States or state governmental entities which fall within the plain meaning of the term "public bodies" are precluded from obtaining Niagara project power for the benefit of State consumers of electricity?

STATEMENT PURSUANT TO SUPREME COURT RULE 21.1

The following parties may have an interest in the outcome of this proceeding:

Federal Energy Regulatory Commission
Power Authority of the State of New York
Connecticut Municipal Electric Energy Cooperative
Allegheny Electric Cooperative, Inc.
Boston Edison Company
Eastern Edison Company
Fitchburg Gas and Electric Light Company
Massachusetts Electric Company
Metropolitan Transit Authority
Municipal Electric Utilities Association of New York State
Vermont Department of Public Service
Public Service Electric and Gas Company
Massachusetts Municipal Wholesale Electric Company
City of Cleveland, Ohio
Bethlehem Steel Corporation
Borough of Lansdale
Sussex Rural Electric Cooperative
Rockland Electric Company
New Jersey Preference Boroughs
General Motors Corporation
Occidental Chemical Corporation
Olin Corporation
Union Carbide Corporation

Attorneys for the above parties and the Solicitor General have been served with copies of this petition.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT PURSUANT TO SUPREME COURT RULE 21.1	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISION INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. The Court Should Grant this Cross-Petition in Order to Obtain a Presentation of the State Access Issue Presented by the Construction of the NRA "Public Bodies" Language	8
II. The Second Circuit's Affirmance of the Decision of the Federal Energy Regulatory Commission was in Error in Ignoring the Plain Meaning of the Statute, Misreading the Legislative History, and Failing to Preserve the Proper Relationship Between Administrative and Judicial Decision Making	12
A. The Second Circuit's Reading of the NRA Conflicts with the Plain Meaning of the Statute	12
B. The Second Circuit misinterpreted the legislative history of the NRA	17
C. The Second Circuit's Decision Transgresses upon the Proper Relationship between Judicial and Administrative Decision Making	21
III. This Court's Guidance is Required to Rectify the Extreme Confusion Displayed by Both the Commission and the Court on a Key Question of Statutory Construction	26
CONCLUSION	29

INDEX OF AUTHORITIES

Page

CASES

Aluminum Company of America v. Central Lincoln Peoples' Utility District, et al., 467 U.S. 380 (1984) 10

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 14

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 14

Bread Political Action Committee v. FEC, 455 U.S. 577 (1982) 14

Caminetti v. United States, 242 U.S. 470 (1917) 13

Chemehuevi Tribe of Indians v. FPC, 420 U.S. 395 (1975) 15

Chemical Manufacturers Ass'n. v. NRDC, 470 U.S. 116, 84 L. Ed. 2d 90 (1985) 21, 24, 25, 26

Chevron U.S.A. Inc. v. National Resource Defense Council, Inc., 467 U.S. 837 (1984) 21, 24, 25, 26

Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 13

FPC v. Jantzen, Inc., 356 F.2d 253 (9th Cir. 1966), *rev'd on other grounds*, 386 U.S. 228 (1967) 27, 28

Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. den.*, 403 U.S. 923 (1971) 27

MTA v. FERC, 796 F.2d 584 (2d Cir. 1986) 1

Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 41-44 (1983) 27

Phillips Petroleum Co. v. FERC, 792 F.2d 1165 (D.C. Cir. 1986) 21, 24, 25

Power Authority of the State of New York v. FERC, 743 F.2d 93 (1984) 7, 13, 17, 21, 28

INDEX OF AUTHORITIES—Continued

Page

Public Service Comm'n of New York v. Mid Louisianna Gas Company, 463 U.S. 319 (1983) 25

Rothschild v. United States, 179 U.S. 463 (1900) 14

SEC v. Chenery, 318 U.S. 80 (1943) 25, 26

United States v. James, — U.S. —, 106 S. Ct. 3116 (1986) 13, 14

REGULATORY AGENCY OPINIONS

Opinion No. 229; Declaratory Opinion and Order Affirming With Modifications Initial Decision on Niagara Preference Power for States Neighboring New York, 30 FERC (CCH) ¶61,323 (March 27, 1985) ..... *passim*

Opinion No. 229-A; Opinion and Order on Rehearing Clarifying Declaratory Opinion in Part, and Granting Petitions to Intervene Out of Time, 32 FERC (CCH) ¶61,194 (July 30, 1985) ..... *passim*

Initial Decision of the Administrative Law Judge, 22 FERC (CCH) ¶63,087 (March 9, 1983) 2

State of Vermont Public Service Board v. Power Authority of the State of New York, 55 FPC 1109 (March 12, 1976) ..... *passim*

STATUTES

Federal

Bonneville Project Act of 1937, 16 U.S.C. § 832c 9, 10

Boulder Canyon Project Act of 1928, 43 U.S.C. § 617(d)(c) 9

Flood Control Act of 1944, 58 Stat. 887 10

Flood Control Act of 1982, 33 U.S.C. § 702c 14

TABLE OF CONTENTS—Continued

Page

Niagara Redevelopment Act, 16 U.S.C. § 836 (1957) 3, 4, 11, 12, 15, 16

Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831(i) 9

State

Rhode Island General Laws of 1956, as amended, Section 39-1-3 4

R.I.G.L. § 39-1-39 (1980) 4

N.J.S.A. 48:2-1 *et seq.* 5

N.J.S.A. 52:27F-6 5

LEGISLATIVE MATERIALS

Senate Bill S.512 ("Clark Bill") 17, 18, 19, 20, 21

Senate Bill S.1037 ("Ives Bill") 17, 19, 21

(Hearings before a Sub-Committee of the Committee or Public Works, United States Senate, 85th Cong. First Sess., on S.512 and S.1037 (April 10, 11, 12, 13, 1957), pp. 1, 2, 4) 17

H.R. Rep. No. 862 8th Cong. 1st Sess. (1957), Reprinted in 1957 U.S. Code & Cong. Ad. News 1585 20

OTHER

Disposition of Surplus Power Generated at Clark Hill Reservoir Project, 41 Op. A.G. 236 (1955) 10

U.S. Supreme Court Rule 17.1(c) 26

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Cross-Petitioners,

v.

METROPOLITAN TRANSPORTATION AUTHORITY,
Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

This cross-petition is filed pursuant to Rule 19.5 of the Rules of the Supreme Court of the United States, in response to a Petition for a Writ of Certiorari filed by the Metropolitan Transportation Authority ("MTA") (*Metropolitan Transportation Authority v. Federal Energy Regulatory Commission*, Docket No. 86-736, filed November 3, 1986). Cross-petitioners seek review by this Court of an opinion and judgment of the United States Court of Appeals for the Second Circuit filed June 17, 1986. *MTA v. FERC*, 796 F.2d 584 (2d Cir. 1986) (A1-A20).[1]

[1]References to "A " are to the Appendix filed by the Metropolitan Transportation Authority with its Petition for a Writ of Certiorari, U.S. Supreme Court Docket No. 86-736. Cross-Petitioners' own Appendix, referenced infra in Section II B, is referenced as "RINJA ".

A petition for rehearing and suggestion for rehearing *en banc* was denied by that court on August 6, 1986 (A21-22).

The opinion affirmed two decisions of respondent Federal Energy Regulatory Commission ("FERC"), *Opinion No. 229; Declaratory Opinion and Order Affirming With Modifications Initial Decision on Niagara Preference Power for States Neighboring New York*, 30 FERC (CCH) ¶61,323 (March 27, 1985) (A49-A85) ("Opinion No. 229"), and *Opinion No. 229-A; Opinion and Order on Rehearing Clarifying Declaratory Opinion in Part, and Granting Petitions to Intervene Out of Time*, 32 FERC (CCH) ¶61,194 (July 30, 1985) (A23-48) ("Opinion No. 229-A"), which had affirmed, with modifications, *Initial Decision of the Administrative Law Judge*, 22 FERC (CCH) ¶63,087 (March 9, 1983) (A86-A140).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 17, 1986. The Court of Appeals denied a petition for rehearing by order filed August 6, 1986. Cross-petitioner Rhode Island Public Utilities Commission received on November 6, 1986, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit of petitioner Metropolitan Transportation Authority, docketed as No. 86-736. Jurisdiction of this Court is invoked under 28 USC § 1254(1) and Rule 19.5 of the Rules of the Supreme Court of the United States.

STATUTORY PROVISION INVOLVED

The statutory provision whose interpretation is at issue is Section 1(b)(1) of the Niagara Redevelopment Act of 1957, 16 USC § 836(b)(1), which provides in relevant part:

> In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance . . .

———o———

STATEMENT OF THE CASE

Congress passed the Niagara Redevelopment Act, 16 USC § 836, (the "NRA") in 1957 to establish a license for the Power Authority of the State of New York ("PASNY") to finance, construct and operate a hydroelectric power project that would "utilize all of the United States share of the water of the Niagara River". 16 USC § 836(a). Under the terms of the NRA, a 50 percent "preference and priority to public bodies and nonprofit cooperatives within economic transmission distance" was also established. 16 USC § 836(b)(1). Of this 50 percent preference, PASNY was required to distribute a "reasonable portion" of the project power to the appropriate agencies in neighboring states. 16 USC § 836(b)(2). The

NRA gave a pivotal role to the States, inviting them to establish bargaining agencies for the procurement of PASNY power. 16 USC § 836(b)(2).

Rhode Island General Laws of 1956, as amended, Section 39-1-3, vests in the Rhode Island Public Utilities Commission, ". . . jurisdiction, powers, and duties to hold investigations and hearings involving the rates, tariffs, tolls and charges and the sufficiency and reasonableness of facilities and accommodations of railroad, gas, electric, water, telephone, telegraph and pipeline public utilities . . . ." Additionally, in 1980 the Rhode Island Legislature passed R.I.G.L. § 39-1-39, which established the Public Utilities Commission as the State's bargaining agent for out-of-state purchases of power:

> *Purchase of power.*—(a) Upon the consent and approval of the governor the commission shall be designated as the agency of the state to negotiate, bargain with and otherwise arrange with any out-of-state electrical energy producer in the public or private sector for the procurement of power capacity and power output from said electrical energy producer with the exclusive right on behalf of the state to contract for the purchase of such power from any producer outside of the state, including the Dominion of Canada and/or any of its provinces and any other state in the United States.
>
> (b) Upon the consent and approval of the governor the commission shall act as the agent for the state for the resale of any power purchased from any public or private out-of-state producer to any Rhode Island electric energy producer whether publicly or privately owned. Such resale by the commission to a Rhode Island electric energy producer shall be made on a non-profit basis without preference or discrimination for distribution within the State.

> (c) The commission, with the consent of the Governor, is authorized and empowered to enter into contracts for the transmission of such power from the place of purchase to a point or points within the state.

Rhode Island thereby sought to take advantage of the NRA's express provision for State public agencies to assume the exclusive role of bargaining agent for their State in the allocation and purchase of PASNY power.

Pursuant to *N.J.S.A.* 48:2-1 *et seq.* and *N.J.S.A.* 52:27F-6, the New Jersey Board of Public Utilities is an administrative agency in the Department of Energy, a principal department established in the Executive branch of the Government of the State of New Jersey. Established by Chapter 195 of the Public Laws of 1911, as subsequently amended by Titles 48 and 52 of the New Jersey Statutes, the New Jersey Board of Public Utilities, amongst other duties and responsibilities, regulates all investor-owned electric utility companies in the State of New Jersey, which companies serve approximately 98% of the residential units of the State of New Jersey.

On November 17, 1981 Brendan T. Byrne, the then Governor of the State of New Jersey, issued Executive Order No. 112, which designated the New Jersey Board of Public Utilities as the bargaining agent for the State of New Jersey for participation in PASNY's 1985 Neighboring State Hydroelectric Allocation Plan Proceeding. Pursuant thereto, on May 14, 1982, the New Jersey Board of Public Utilities submitted an application to PASNY to receive an allocation of its low cost hydroelectric power. Subsequently, on October 12, 1982, Thomas Kean, Governor of the State of New Jersey, issued Executive Order No.

112, ordered the New Jersey Board of Public Utilities to be the designated bargaining agent for the State in the proceedings before PASNY, and authorized the New Jersey Board of Public Utilities to allocate all power received from PASNY to all residential electric consumers in the State, whether they be serviced by investor-owned, cooperative or municipally-owned electric utilities, pursuant to such terms and conditions as PASNY deemed appropriate.

On January 31, 1984, PASNY rendered its Decision Adopting in Part and Modifying in Part Recommended Decision in its 1985 Neighboring State Hydroelectric Allocation Plan Proceeding, allocating to the New Jersey Board of Public Utilities, as the bargaining agent for the State of New Jersey, an allocation of low cost hydro-electric power from the Niagara and St. Lawrence projects, based upon the total number of New Jersey residential customers, whether served by a municipal utility, a rural electric cooperative association or an investor-owned utility.

The Rhode Island Public Utilities Commission as designated exclusive bargaining agent for the State of Rhode Island also intervened in PASNY's 1985 Neighboring State Hydroelectric Allocation proceeding, sponsoring a preference power application on behalf of all Rhode Island domestic consumers. Rhode Island's application was approved by the PASNY examiner and Trustees, and Rhode Island contracted for an allocation of 15 megawatts for the period 1985-1995.

However, before the allocations could be implemented, the Federal Energy Regulatory Commission ("FERC") issued its Opinions No. 229 and 229-A. *Declaratory Opinion and Order Affirming with Modifications Initial Deci-*

sion on Niagara Preference Power for States Neighboring New York, 30 FERC (CCH) ¶61,323 (March 27, 1985); *Opinion and Order on Rehearing Clarifying Declaratory Opinion in Part, and Granting Petitions to Intervene Out of Time,* 32 FERC (CCH) ¶61,194 (July 30, 1985).

In Opinion Nos. 229 and 229-A, the Commission, largely relying on its reading of an earlier decision of the Second Circuit Court of Appeals, *Power Authority of the State of New York v. FERC,* 743 F.2d 93 (1984), reversed its own previous decision in *State of Vermont Public Service Board v. Power Authority of the State of New York,* 55 FPC 1109 (March 12, 1976) (*"Vermont* PSB"), and Initial Decision rulings that the Vermont Department of Public Service ("Vermont DPS") qualified as an NRA public body. In Opinion No. 229, *supra,* the Commission explained that the Vermont DPS was not an NRA public body because it did not own a retail electric distribution system. In Opinion No. 229-A, *supra,* the Commission immediately withdrew the retail distribution system ownership requirement, but maintained that Vermont was not a public body because it was not serving retail load. (One Commissioner dissented to the two FERC opinions asserting that the Commission's public body rulings were contrary to the plainly stated provisions of the NRA.)

As a result of these FERC decisions below, the allocation to cross-petitioner States was dramatically reduced. Rhode Island's allocation, for instance, has been limited to the tiny Pascoag Fire District, serving 3000 persons, and New Jersey's non-investor-owned public utilities serve only 2% of the residential units of the State.

REASONS FOR GRANTING THE WRIT

There are at least five reasons for granting the cross-petition:

Petitioner MTA only raised in part the issue considered below, and the question MTA presents omits the important questions involving access by States on behalf of their citizens to Niagara hydropower.

The Second Circuit's affirmance of FERC's decision below was in error in failing to follow the plain meaning of the NRA.

The Second Circuit's reading of the legislative history is inconsistent with the bills actually being debated.

The Second Circuit's decision was in error in failing to respect the proper relationship between judicial and administrative decision making established by decisions of this Court.

This Court's guidance is required to rectify the confusion exhibited by both the FERC and the Second Circuit in their inconsistent decisions regarding this key issue of statutory construction.

I. THE COURT SHOULD GRANT THIS CROSS-PETITION IN ORDER TO OBTAIN A PRESENTATION OF THE STATE ACCESS ISSUE PRESENTED BY THE CONSTRUCTION OF THE NRA "PUBLIC BODIES" LANGUAGE.

Under Rule 19.5 of the Rules of this Court this cross-petition depends on the granting of Petitioner MTA's petition for a writ of certiorari. However, if that petition is granted, then this cross-petition must also be granted in

order for this Court to consider all of the relevant issues raised by the challenged construction of the term "public bodies" in the NRA. The question presented by petitioner MTA offers to this Court the issue of "a government agency which uses the hydropower itself, but does not resell the hydropower to other consumers of electricity". The issue of what a "public body" is within the meaning of the NRA is still broader.

The background of this case is that States have long been recognized as eligible recipients of Federal hydropower. The Boulder Canyon Project Act of 1928, 43 U.S.C. § 617(d)(c) specified that "states" were to be eligible recipients of Federal preference power. Indeed, under the Boulder Canyon Act, states were the only statutorily specified recipients of the Federal preference. (A-64). Chronologically, next was the Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831(i), which expanded the classes of preference customers to include "counties, municipalities and cooperative organizations" as well as States.

The objective of establishing domestic and rural consumers as the chief preference power beneficiaries was first explicitly recognized in the Bonneville Project Act of 1937, 16 U.S.C. § 832c. The Bonneville Act also introduced the term "public bodies" and declared that the preference for "public bodies and cooperatives" was for the purpose of insuring that domestic and rural consumer benefits would be realized. In pertinent part, the statutory recital is:

> In order to insure that the facilities for the generation of electric energy at the Bonneville project shall be operated for the benefit of the general public, and

> particularly of domestic and rural consumers, the administrator shall at all times, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives. [16 U.S.C. § 832c(a)].

Under the Bonneville Act, the term "public bodies" specifically includes States:

> As employed in this chapter, the term "public body", or "public bodies", means States, public power districts, counties, and municipalities, including agencies or subdivision of any thereof. [16 U.S.C. § 832(b) (1982)].

See also Aluminum Company of America v. Central Lincoln Peoples' Utility District, et al., 467 U.S. 380, 384 (1984) (preference customers under the Bonneville Act consist of "States, public power districts, counties and municipalities, including agencies or subdivisions of any thereof.") Thereafter, in the Flood Control Act of 1944, 58 Stat. 887, and in the NRA, Congress used the Bonneville Act's "public bodies" terminology without defining the term. As recognized by the Attorney General of the United States, the absence of the "public bodies" definition was not intended to change the entities who are eligible to purchase preference power. *Disposition of Surplus Power Generated at Clark Hill Reservoir Project,* 41 Op. A.G. 236, 249 (1955).

States have thus traditionally been regarded as recipients of the Federal preference. The NRA itself confirmed the important role of neighboring States with the statutory provision that States may designate bargaining agencies, in which case PASNY "shall deal only with such

agency in that State'' for the procurement of power on behalf of the state. 16 U.S.C. section 836(b)(2). Cross-petitioners Rhode Island and New Jersey as well as other states including Massachusetts and Vermont, have established designated state bargaining agencies for the purchase of PASNY power. The issue of whether these States, through their designated state bargaining agencies, are ''public bodies'' within the meaning of the NRA was addressed below both at the administrative and appellate levels.

In fact, the status of the Vermont Department of Public Service, Vermont's designated state bargaining agency, was the primary focus of controversy below. To review the definition of ''public bodies'' under the NRA only in light of the petition of the MTA would be to turn a blind eye to the State access issue that the definition of the term presents.

The neighboring States contemplated by the NRA have had their role reduced or eliminated by FERC's construction of the statute, to the detriment of thousands of state citizens who are domestic and rural consumers of electric power, and impairing the rights of the States as sovereigns to protect the interests of their citizens as consumers of electricity. The breadth and importance of the issue of State access to Niagara hydropower requires that it be reached as well, if this Court grants the MTA petition.

II. THE SECOND CIRCUIT'S AFFIRMANCE OF THE DECISION OF THE FEDERAL ENERGY REGULATORY COMMISSION WAS IN ERROR IN IGNORING THE PLAIN MEANING OF THE STATUTE, MISREADING THE LEGISLATIVE HISTORY, AND FAILING TO PRESERVE THE PROPER RELATIONSHIP BETWEEN ADMINISTRATIVE AND JUDICIAL DECISION MAKING.

A. The Second Circuit's Reading of the NRA Conflicts with the Plain Meaning of the Statute.

On its face, the NRA's language is clear, understandable, and unequivocal: preference power allocated from the Niagara project is to be made "available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available . . . in such manner as to encourage the *widest possible use.*" 16 U.S.C. § 836(b)(1) (emphasis added). In order to achieve this result, Congress further provided that PASNY is to "give preference and priority to public bodies and nonprofit cooperatives." *Id.*

Central to the Commission's administration of the NRA, then, is the definition it gives to the term "public bodies." In its own previous decision in *State of Vermont Public Service Board v. Power Authority of the State of New York*, 55 FPC 1109 (1976) (*Vermont PSB*), the Commission originally gave this term the encompassing definition that would logically follow from the ordinary meaning of "public bodies", as well as from the lack of any express statutory restriction on its meaning. Curiously, the FERC then performed a 180-degree turn-around on

that position in Opinions Nos. 229 and 229-A, substantially relying on an opinion of the Second Circuit Court of Appeals, *Power Authority of the State of New York v. FERC*, 743 F.2d 93 (1984) (*"PASNY"*). In affirming the FERC's revised definition, the Second Circuit compared the definition to the obvious meaning of that phrase:

> Literally, the term "public bodies" is not limited to "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." However, the legislative history of the NRA demonstrates that this is what Congress intended the term to mean.

(A12).

This single paragraph embodies the error within the Second Circuit decision. This Court's long-standing instruction is that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). To the degree that any resort to legislative history is permitted in such instances, it is solely to determine if there is a clearly expressed legislative intent to the contrary. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980), *cited in United States v. James*, — U.S. —, 106 S. Ct. 3116, 3122 (1986) (*"James"*). Notably, in its earlier *PASNY* decision, *supra*, the Second Circuit adverted to the principle of deference to administrative expertise, but continued:

> Of even greater importance in this case is the maxim that "(a)bsent a clearly expressed legislative intention to the contrary, (statutory) language must ordinarily be regarded as conclusive."

PASNY, 743 F.2d at 103, quoting *Bread Political Action Committee v. FEC*, 455 U.S. 577, 580 (1982) (further citations omitted).

When legislative history falls short of such overriding contradiction, and when the language of a statute is clear, legislative history is not to be used as a tool of interpretation, but merely a means to corroborate the plain meaning of a statute. In *James, supra*, the Court explained:

> The starting point in statutory interpretation is "the language of the statute itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 . . . (1975) (Powell, J., concurring). "[W]e assume that the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

James, 106 S.Ct. at 3121. In determining that the meaning of the quoted statute was plain, the Court acknowledged: "It is difficult to imagine broader language." *Id.*[2] This determination then led the Court to refer to the legislative history only to reinforce its understanding of what the plain meaning of the statute was. *Id.* at 3122. Given the NRA's equally plain and broad language, the Second Circuit should have followed the lead of this Court in *James*.

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[2]At issue in *James* was the immunity provision of Section 702c of the Flood Control Act of 1982, 33 U.S.C. § 702c (1982): "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." The Court noted that "given the plain terms of the statute, 'it requires some ingenuity to create ambiguity.' *Rothschild v. United States*, 179 U.S. 463, 465 (1900)." *Id.*

The Second Circuit would have been far better served in its decision below by eschewing its resort to legislative history, and instead following the doctrine that the various provisions of the NRA quoted above should be read together. *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 403 (1975). The clear intent of Congress embodied in the NRA is that "public bodies" and "nonprofit cooperatives" are to be given preference in order to ensure that the sale and distribution of Niagara preference power is "primarily" for the benefit of domestic and rural consumers, *and* to encourage the "widest possible use." 16 U.S.C. § 836(b)(2). There is no restriction apparent on the face of the statute on the type of agency that may be considered a "public body", as long as the goal of receipt primarily for the benefit of domestic and rural consumers over the widest possible use is achieved. Indeed, the narrow reading is contrary to the inclusion of *both* "public bodies" and "nonprofit cooperatives" as statutory recipients. Obviously, Congress intended the term "public bodies" to mean something in addition to, and separate from, "nonprofit cooperatives." Yet the restrictive definition of "public bodies" to mean only "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail" would qualify few types of entities other than nonprofit cooperatives. Additionally, as we have explained in Section I, *supra*, the NRA specifically establishes a role for state bargaining agencies, providing:

> That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the licensee (PASNY) shall deal only with such agency in that State.

16 U.S.C. § 836(b)(2). This role is rendered meaningless by the decisions below.

The "widest possible use" measure, *supra*, provides a compelling example of the Second Circuit's distortion of the NRA's plain meaning and intent. The cross-petitioners, as designated State bargaining agencies, are in a unique position to purchase Niagara preference power on behalf of *all* the domestic and rural consumers in their respective States. The States can assure that no additional charges are added to the price ultimately paid for the power by these consumers, that investor-owned utilities obtain no profit from the transaction, and that consumers receive the power at "the lowest rates reasonably possible." 16 U.S.C. § 836(b)(1). The cross-petitioners may use the facilities of local utilities to distribute the power, without relinquishing control over the power's distribution, and as regulators of retail rates determine the price at which Niagara preference power is sold. Even under so-called "yardstick competition" theory, no process will make regulators more cognizant of the opportunities of low-cost electric power than to be the actual implementers and conduits of that power.

The allocation of Niagara preference power to cross-petitioners, more than to any other type of "public body", will fulfill the goals of the Act to distribute Niagara power to domestic and rural consumers as widely as possible, at the lowest possible rates, and without profit. The Second Circuit's interpretation of the NRA deprives thousands of consumers within neighboring States of the benefits of the low cost Niagara power contrary to the clearly expressed legislative intent to encourage the "widest possible use"

of the power. No agency or court should narrow a definition that Congress meant to be so broad, and described so plainly.

B. The Second Circuit misinterpreted the legislative history of the NRA.

In *PASNY v. FERC*, the Second Circuit wisely cautioned prudence in the use of legislative history to interpret the NRA noting that the "agonizingly long legislative history of the NRA . . . contains many statements, which when taken out of context, appear to support varied interpretations of the statute". 743 F.2d at 105. However, in the case below, the Second Circuit abandoned its own wise counsel and plunged into the thicket of legislative history without reference to the context of the 1957 debates.

While the legislative history of the NRA was "agonizingly long", by 1957 when the NRA was passed, the numerous differences in the Congress were narrowed down to two Senate Bills; S.512, the so-called Clark Bill which was favored by proponents of a strong municipal preference and S.1037, the so-called Ives bill which was favored by the New York Congressional delegation and which contained a weaker municipal preference clause.[3] These two bills provide the context necessary to interpret the 1957 legislative history. The critical error in the Second Circuit's opinion, which led to its ultimate finding that States are not eligible public body purchasers of preference pow-

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[3]Hearings before a Sub-Committee of the Committee on Public Works, United States Senate, 85th Cong. First Sess., on S.512 and S.1037 (April 10, 11, 12, 13, 1957), pp. 1, 2, 4 (RINJA 1-10).

er, was its mistaken notion that S.512 "never offered a preference to non-defense related government bodies which did not distribute the power to consumers" (A-15).

The S.512 preference provision states in pertinent part:

> In contracting for the disposition of project power, the licensee (the New York Power Authority) shall (A) give equal preference for the purchase of such power to (i) counties and municipalities, including their agencies or instrumentalities, (ii) departments, agencies, and instrumentalities of New York State, (iii) rural electric cooperatives not organized or administered for profit but primarily for the purpose of supplying electric energy to their members as nearly as possible at cost; and (iv) the defense agencies of the United States, and (B) make flexible arrangements and contracts for the disposition of project power to utility companies organized and administered for profit, with suitable provisions in such contracts for the withdrawal upon reasonable notice and fair terms of enough power to meet the needs of the foregoing classes of preference customers.
>
> * * *
>
> The licensee shall make a reasonable portion of the project power available for use within economic transmission distance in neighboring States and shall cooperate with the appropriate agencies in such States to insure compliance with this requirement.
>
> * * *
>
> Project Power shall be sold and distributed primarily for the benefit of the people as consumers, and particularly for the benefit of domestic and rural consumers, to whom it shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use. (RINJA 2-4).

By contrast, Senate Bill 1037 provided that the Federal Power Commission license issued to the Power Authority for construction of the Niagara Project was to include:

> (d) a provision giving defense agencies of the United States a preference to purchase power;
>
> (e) a provision requiring a reasonable amount of power to be made available within the project's economic market area in neighboring States to be distributed according to their laws;
>
> (f) a provision requiring that a reasonable amount of the power available in the State of New York and of the power made available in neighboring States under paragraph (e) be allocated for the present and reasonably foreseeable future needs of rural electric cooperatives and municipalities in the project's economic market area.

(RINJA 8).

A reading of the two bills makes two points with compelling clarity. First, S.512 was far more specific than S.1037 in establishing that a specific portion of the project power would be available to and reserved for municipal electric utilities and cooperatives. Second, contrary to the Court's conclusion, S.512 *did* offer "a preference to non-defense related government bodies which did not distribute power to consumers" (A-15). S.512 included as preference customers counties and municipalities, including their agencies and instrumentalities, and departments, agencies, and instrumentalities of New York State, none of whom was necessarily a distributor of power to consumers.

Senate Bill S.512 contains a stronger municipal preference clause than S.1037, yet nothing in S.512 or in the legislative history supports a judgment that the Congress

believed that the S.512 preference would restrict power sales to governmental entities owning electric distribution systems.[4] The legislation contained in H.R. 862 which actually became the NRA[5] was a compromise among the various factions in Congress including those on both sides of the municipal preference issue. That compromise was intended to narrow rather than exacerbate the differences in Congress. There was no intent in Congress to insert in the NRA a stronger municipal preference provision than included in the Clark bill.

As to preference, the NRA compromise took these essential forms: first, the scope of the preference was confined to 50% of the power to be sold from the project; second, the preference for cooperatively owned electric systems was retained; and third, the term "public bodies" which had been historically used in Federal hydropower statutes to denote a large class of recipients—not merely governmental electric systems—was substituted for the

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[4]In interpreting S.512 as containing an exclusive municipal preference the Court was led to conclude that Senator Kerr and Representative Dooley of the New York Congressional delegation did not understand the NRA legislation (A-15). In fact, Senator Kerr, the Senate majority leader, was responsible for shepherding the NRA through the legislative process and he actually authored the compromise measure which became the NRA (A-36). Congressman Dooley was an active member of the New York Congressional delegation which the FERC recognized as having a veto power over any NRA legislation which was not to its liking (A-31, A-32, fin. 9). In short, the Court's facially-wrong interpretation of S.512 and the entire package of NRA legislative history cannot be reconciled with the views of Congressmen who were on the scene, who were familiar with the contents of the proposed legislation and who were instrumental in the NRA's enactment.

[5]H.R. Rep. No. 862 8th Cong. 1st Sess. (1957), Reprinted in 1957 U.S. Code & Cong. Ad. News 1585.

classes of preference customers enumerated in S.512 and S.1037. The NRA legislative history seen in context thus provides no basis for the Second Circuit's judgment that the term "public bodies" was intended to be restricted to public bodies owning municipal electric distribution systems.

States have traditionally been regarded as recipients of the federal preference (Section I, *supra*), and there was no intent in the NRA to exclude States from the Federal preference power requirements. The Court should issue its writ of certiorari to correct the consequent abridgement of the cross-petitioner States' rights.

C. The Second Circuit's Decision Transgresses upon the Proper Relationship between Judicial and Administrative Decision Making.

FERC Opinion No. 229 and the Second Circuit decision affirming it are also defective in that the FERC decision is not based on the FERC's own, independent interpretation of the NRA, but relies on a decision of the Second Circuit in an earlier case, *Power Authority of the State of New York v. FERC*, 743 F.2d 93 (2nd Cir. 1984) ("*PASNY*"). By subordinating its own judgment to the Second Circuit's *PASNY* decision, the FERC abdicated its decisional responsibility and ignored this Court rulings in *Chevron U.S.A. Inc. v. National Resource Defense Council, Inc.*, 467 U.S. 837 (1984) and *Chemical Manufacturers Ass'n. v. NRDC*, 470 U.S. 116, 84 L. Ed. 2d 90 (1985). Opinion No. 229 as affirmed by the Second Circuit is also in conflict with the opinion of the District of Columbia Circuit Court of Appeals in *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165 (D.C. Cir. 1986), which applied the *Chevron/*

Chemical Manufacturers rule in circumstances exactly paralleling the circumstances of the Second Circuit decision below.

The NRA provides that Niagara power is to be distributed at the lowest possible cost on as wide a basis as possible primarily to "domestic and rural consumers". 16 U.S.C. § 836(b)(1). The NRA preference for domestic and rural consumers is called "an end-use preference" in Opinion No. 229 (A-63). This end-use preference determination was critical to the Commission's former interpretation that states as "public bodies" had the authority to purchase Niagara preference power and to resell that power to their domestic and rural consumers without regard to whether those consumers received the balance of their electricity from private utility companies or municipally or cooperatively owned electric distribution systems. In Opinion No. 229, the FERC rejected its earlier ruling in *Vermont PSB* and the ruling by the Administrative Law Judge precisely because those rulings were predicated on the statute's "end-use" preference for domestic and rural consumers (A-63). The commission asserted:

> The critical error in the Initial Decision in this case and the *Vermont* [*PSB*] decision upon which the judge relied, is the assumption that the NRA contains an end-use preference. In defining VDPS [a state agency] as a public body, the judge put great weight upon the fact that VDPS was using the preference power to benefit domestic and rural consumers. Initial Decision at page 1. *Yet the Second Circuit* [*in PASNY*] *has now ruled that the NRA contains no end-use preference.* (A. 63, emphasis added).

Opinion No. 229's reversal of the *Vermont PSB* decision over this "critical error", *id.*, was the undistilled result of FERC subordination to its perception of the Second Circuit decision in *PASNY*. Instead of independently evaluating the NRA public body provision in light of the statutory domestic and rural consumer preference, the FERC treated that preference as a nullity in "obedience" to the Second Circuit's *PASNY* decision (A-63). The FERC "reasoning" was that "PASNY has instructed us not to scrutinize end-use" (A-63); that *PASNY* establishes that "the NRA contains no end-use preference" (A-63); and that *PASNY* had "rejected an end-use preference" (A-64). The FERC even rested its ultimate finding that states were not NRA public bodies on the use in the *PASNY* decision of "the term 'municipal utilities' for public bodies" (A-65). The Opinion 229 thus was shaped in a decisive, dispositive and impermissible manner by the FERC's subservience to the *PASNY* decision of the Second Circuit and not FERC's experience and expertise.[6]

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[6]Although in Opinion 229-A the FERC asserted that it had "not read the Second Circuit's decision to be determinative" (A-28), it admitted that it believed it was compelled "to depart from [its own] interpretation of 'public body' and to seek guidance from the legislative history in determining congressional intent", *id.*, by its view that the Second Circuit had determined in *PASNY* that the NRA does not contain an end-use preference. This belief was "critical" to its decision (A-63). In fact, despite its disclaimer, the FERC's lack of independent judgment is evident throughout its analysis. Thus, the FERC in Opinion 229-A explained, "any other interpretation of 'public bodies' would lead to absurd results and would thwart the purposes of the NRA, as those purposes have been defined by the Second Circuit in *PASNY*." (A-30).

Opinion No. 229 and the Second Circuit decision both violate this Court's rulings in *Chevron* and *Chemical Manufacturers Ass'n., supra.* In *Chevron,* this Court held that Where the statutory intent of Congress requires judicial or administrative interpretation, that interpretation must be supplied at least in the first instance by the regulatory agency. Once the agency has furnished its interpretation, it becomes the responsibility of the reviewing court to determine if the agency's interpretation "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute" (467 U.S. at 845). In *Chemical Manufacturers,* the Court stated:

> This view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that EPA might have adopted but only that EPA's understanding of this very "complex statute" is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA. [470 U.S. at 125, 84 L.Ed. 2d at 98].

Here the FERC and the Second Circuit have stood the *Chevron/Chemical Manufacturers* doctrine on its head. Instead of deference by the court to the agency, the court and the agency offer deference by the agency to the court. Thus, the court improperly preempts and the agency improperly eschews the pivotal role reserved for the agency in statutory interpretation.

In *Phillips Petroleum, supra,* the District of Columbia Circuit, like the Second Circuit below, was confronted with an agency which had subordinated its decisional responsibilities to its perception of the requirements of a court decision. The *Phillips* Court observed that in the case before it the FERC had viewed itself as having no independ-

ent choice, that it regarded itself as "bound", 792 F.2d at 1170, and "required", *id., quoting* FERC Order No. 391, Fed.Reg. at 33,852, to follow its perception of an interpretation of this Court in *Public Service Comm'n of New York v. Mid Louisiana Gas Company,* 463 U.S. 319 (1983). However, unlike the Second Circuit, the District of Columbia Circuit adhered to the *Chevron* and *Chemical Manufacturers* decisions, and remanded the case to the agency for a decision in keeping with the agency's statutory responsibilities. The District of Columbia Circuit justified its action with reference to this Court's holding in *SEC v. Chenery,* 318 U.S. 80 (1943):

> If the [agency] action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the court does come into play, an agency order may not stand if the agency has misconceived the law. [*Chenery,* 318 U.S. at 94, as quoted in *Phillips,* 792 F.2d at 1170].

The *Phillips* Court concluded:

> We express no opinion about the "correct" interpretation of the [statute]. We have discussed the competing interpretations . . . merely to illustrate the complex task forsaken by FERC when it incorrectly concluded that it was bound by *Mid-Louisiana.* On remand, FERC may construe [the statute] so as to justify parity in rates, or it may otherwise interpret [the statute]; but FERC *may not* assume any particular construction is mandated by *Mid-Louisiana* (792 F.2d at 1172).

The failure of the FERC in this case to fulfill its indispensable role in the administrative process should have triggered the Second Circuit to remand the case to the FERC to require that agency to exercise its judgment. Given the FERC's deference to the Second Circuit and abandonment of its independent analysis of the statute, in light of *Chevron, Chemical Manufacturers* and *Chenery* the Second Circuit's failure to take that action was in error and warrants the issuance of the writ of certiorari which cross-petitioners have requested.

III. THIS COURT'S GUIDANCE IS REQUIRED TO RECTIFY THE EXTREME CONFUSION DISPLAYED BY BOTH THE COMMISSION AND THE COURT ON A KEY QUESTION OF STATUTORY CONSTRUCTION

The Second Circuit's decision affirming the FERC's overly restrictive definition of "public body" has done nothing to clarify what is an area of increasing confusion: precisely which governmental entities qualify as "public bodies" to receive Niagara preference power. This Court's exercise of its discretion to grant a writ of certiorari is justified where, as here, a federal court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. R. 17.1 (c).

The confusion and uncertainty that currently exist on this point are manifested in several ways. First, and most significant, is the abrupt about-face in the FERC rulings below. The determination that the Department of Public Service of the State of Vermont is not a public body within the scope of the NRA and therefore is not entitled to

purchase Niagara preference power on behalf of its domestic and rural consumers inexplicably overrules the Commission's own prior judgment to the contrary in *State of Vermont Public Service Board v. Power Authority of the State of New York*, 55 FPC 1109 (1976) (*"Vermont PSB"*). There the Commission found that the same state agency[7], subject to the same statute and operating under the same conditions, did qualify as a public body under the NRA.

The Commission of course has a right to interpret anew a statute it is charged with administrating—but only if there is a rational basis for the shift in policy. *See Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 41-44 (1983); *see also, Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. den.*, 403 U.S. 923 (1971). Where there has been an unjustified departure from a prior decision, less deference to the agency is due.[8]

> A consistent interpretation of a statute by a body created to administer it is indeed entitled to judicial respect. But it goes beyond all reason to apply the same rule to diametrically inconsistent positions taken by such a body.

FPC v. Jantzen, Inc., 356 F.2d 253, 257 n.4 (9th Cir. 1966), *rev'd on other grounds*, 386 U.S. 228 (1967) (*"Jantzen"*).

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[7]The Vermont Department of Public Service was previously the Vermont Public Service Board.

[8]As discussed above, to the degree that FERC seeks to rationalize this change as one based not on its own judgment as to the appropriate reading of the Act, but instead as a response to an instruction from the Second Circuit, the change likewise cannot stand. *See* Section II C, above.

In *Jantzen*, the Ninth Circuit explained further that the deference that is due is to the interpretation that is closer in time to enactment of the statute at issue. *Jantzen*, 356 F.2d at 257 n.4. Manifestly, in this case, that is the 1976 *Vermont PSB* decision.

The confusion is continued in the subsequent "flip-flop" the Commission performed between March and July of 1985 in Opinions Nos. 229 and 229-A. In Opinion No. 229, the Commission stated that a NRA "public body" must own a retail electric distribution system. In Opinion No. 229-A, it immediately changed the requirement to having responsibility for a retail electric load.

The confusion at the administrative level is paralleled now at the federal appellate level. The Second Circuit's affirmance of Opinion No. 229-A is at variance with that circuit's prior counsel in *PASNY*:

> If Congress had wanted to restrict resale to domestic and rural consumers it could easily have done so simply by stating that the power was to be made available to public bodies "for resale only" to such consumers.

PASNY, 743 F.2d at 104. Similarly, if Congress had wanted to restrict the term "public bodies" to entities with retail distribution systems or with retail load responsibilities, "it could easily have done so simply by stating that the power was to be made available [only] to public bodies" possessing those precise criteria. *Id.* The Second Circuit's affirmation of the Commission's more recent

opinion creates a conflict within that circuit: *PASNY*'s approach to Congress' intent expressed in the NRA regarding the allocation of Niagara preference power cannot be squared with the same circuit's opinion below.

The inconsistency between FERC's decision in *Vermont PSB* and Opinion No. 229 exacerbated by the further inconsistency between Opinions Nos. 229 and 229-A, is supplemented by the inconsistency within the Second Circuit. Under these circumstances, and given the importance of the issue to thousands of State consumers, this confusion calls for this Court's definitive guidance. Cross-petitioners respectfully assert that this Court should exercise its discretion and grant the petition for a writ of certiorari.

CONCLUSION

Because petitioner MTA does not present this Court the State access issue presented below by the challenged statutory construction, because of the Second Circuit's failure to abide by the plain meaning of the NRA, to correctly read the legislative history of the NRA, and to correct FERC's abdication of its administrative responsibilities, and because of the confusion exhibited by both forums, cross-petitioners Rhode Island Public Utilities Commission and New Jersey Board of Public Utilities respectfully

request their cross-petition for a writ of certiorari be granted.

DATED: December 5, 1986

Respectfully submitted,

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APPENDIX

DEVELOPMENT OF POWER AT NIAGARA FALLS, N. Y.

WEDNESDAY, APRIL 10, 1957

UNITED STATES SENATE.
COMMITTEE ON PUBLIC WORKS,
SUBCOMMITTEE ON FLOOD CONTROL—
RIVERS AND HARBORS,

Washington, D. C.

The subcommittee met, pursuant to notice, at 10:07 a.m., in room 412, Senate Office Building, Hon. Robert S. Kerr, presiding.

Present: Senators Kerr (chairman of the subcommittee), Gore, Neuberger, Scott, Carroll, Case, Kuchel, Cotton, and Hruska.

Also present: Senators Clark (Pennsylvania), Ives (New York), Javits (New York), and Congressman Miller (New York).

Senator Kerr. The committee will be in order.

We have before us S. 512 and S. 1037, bills to authorize the construction of certain works of improvement in the Niagara River for power and other purposes.

(S. 512 and S. 1037 follow:)

[S. 512, 85th Cong., 1st sess.]

A BILL To authorize the construction of certain works of improvement in the Niagara River for power and other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress as-

sembled. That pursuant to the provisions of the reservation of the Senate of the United States in giving its advice and consent to the ratification of the treaty between the United States of America and Canada concerning uses of the waters of the Niagara River signed February 27, 1950, which provides that no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress, a project for the redevelopment of the United States share of such waters for power purposes is hereby authorized, in accordance with existing general laws of the United States and this Act. This authorization constitutes compliance with the reservation to said treaty and is consistent therewith.

Sec. 2. (a) The Federal Power Commission is hereby authorized and directed to issue a license to the New York Power Authority for the construction and operation of the project, upon its application therefor and its acceptance of licensing conditions set forth in this section.

(b) The Federal Power Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act, the following:

(1) In contracting for the disposition of project power, the licensee (the New York Power Authority) shall (A) give equal preference for the purchase of such power to (i) counties and municipalities, including their agencies or instrumentalities, (ii) departments, agencies, and instrumentalities of New York State, (iii) rural electric cooperatives not organized or administered for profit but primarily for the purpose of supplying electric energy to

their members as nearly as possible at cost; and (iv) the defense agencies of the United States, and (B) make flexible arrangements and contracts for the disposition of project power to utility companies organized and administered for profit, with suitable provisions in such contracts for the withdrawal upon reasonable notice and fair terms of enough power to meet the needs of the foregoing classes of preference customers.

(2) The licensee shall, if available on reasonable terms and conditions, acquire by purchase or other agreement, the ownership or use of, or if unable to do so, construct such transmission lines as may be necessary to make the power and energy generated at the project available in wholesale quantities for sale on fair and reasonable terms and conditions to privately owned companies, to the preference customers enumerated in subparagraph (1) (A) of this subsection, and to the neighboring States in accordance with paragraph (3) of this subsection.

(3) The licensee shall make a reasonable portion of the project power available for use within economic transmission distance in neighboring States and shall cooperate with the appropriate agencies in such States to insure compliance with this requirement. In the event of disagreement between the licensee and the power-marketing agencies of any of such States, the Federal Power Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: *Provided*, That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the licensee shall deal only with such agency in that State. With respect to the share of the power so allocated, the arrangements

made by the licensee for the sale of power to or in such States shall include observance of the preferences numbered (i) and (iii) in subparagraph (1)(A) of this subsection.

(4) Project power shall be sold and distributed primarily for the benefit of the people as consumers, and particularly for the benefit of domestic and rural consumers, to whom it shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use.

(5) In the event project power is sold to any purchaser for resale, contracts for such sale shall include adequate provisions for establishing resale rates, to be approved by the licensee, consistent with paragraph (4) of this subsection.

(6) The licensee, in cooperation with the appropriate agency of the State of New York which is concerned with the development of parks in such State, shall construct a scenic drive and park of the American side of the Niagara River, near the Niagara Falls, pursuant to a plan, the general outlines of which shall be approved by the Federal Power Commission; and the cost of such drive and park shall be considered a part of the cost of the power project and part of the licensee's net investment in said project: *Provided,* That the maximum part of the cost of such drive and park to be borne by the power project and to be considered a part of the licensee's net investment shall be $15,000,000.

(7) The licensee shall pay to the United States and include in its net investment in the project herein authorized the United States share of the cost of the construc-

tion of the remedial work, including engineering and economic investigations, undertaken in accordance with article II of the treaty referred to in the first section of this Act whenever such remedial works are constructed by the United States.

Sec. 3. The license issued under the terms of this Act shall be granted in conformance with Rules of Practice and Procedure of the Federal Power Commission, but in the event of any conflict, the provisions of this Act shall govern in respect of the project herein authorized.

Sec. 4. This Act may be cited as the "Niagara Redevelopment Act of 1957".

[S. 1037, 85th Cong., 1st sess.]

A BILL To authorize the construction of certain works of improvement in the Niagara River for power and other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

CONGRESSIONAL FINDINGS

SECTION 1. The Congress hereby finds and declares—

(a) that an emergency exists in the western part of the State of New York as a result of a rock slide which on June 7, 1956, destroyed most of the facilities employed by the licensee of Federal Power Commission project 16 for the generation of power by the use of waters of the Niagara River;

(b) that the power generated at such facilities was largely used by electrochemical and electromet-

allurgical industries vital to the defense of the United States and employing a large portion of all workers resident in the vicinity;

(c) that these industries would be forced to curtail their operations drastically or abandon them at a cost of tens of thousands of jobs were it not that they are able to receive necessary power at high cost on a temporary basis from the generating facilities of the Hydro-Electric Power Commission of Ontario which is using not only Canada's share of the water permitted under the treaty signed on February 27, 1950, between the United States and Canada, but also a large part of the United States share of such water;

(d) that the licensee of project 16 is entitled to use nineteen thousand seven hundred and twenty-five cubic feet per second of the United States share of the waters until 1971 and to use a further twelve thousand seven hundred and seventy-five cubic feet per second until further order of the Commission;

(e) that by the use of this total of thirty-two thousand five hundred cubic feet of water per second, the licensee of project 16 annually produced approximately four billion kilowatt-hours of energy;

(f) that a modern hydroelectric plant proposed to be constructed by the Power Authority of the State of New York to take advantage of the entire drop of the Niagara River can produce about the same amount of power by the use of nineteen thousand seven hundred and twenty-five cubic feet of such water per second;

(g) that by the use of this water and of the additional water permitted to be used under the 1950 treaty, approximately thirteen billion kilowatt-hours annually of urgently needed power can be produced by the project; and

(h) that it is, therefore, imperative that the works to produce such power be constructed without further delay.

ISSUANCE OF LICENSE

SEC. 2. The Federal Power Commission is hereby expressly authorized and directed to issue a license pursuant to the Federal Power Act to the Power Authority of the State of New York for a power project with capacity to utilize all of the United States share of the waters of the Niagara River permitted by international agreement.

CONDITIONS OF LICENSE

SEC. 3. The Federal Power Commission shall include among the conditions of the license issued under section 2—

(a) a provision requiring the licensee to reimburse the United States for its share of the cost of construction of remedial works, including engineering and economic investigations, undertaken in accordance with article II of the 1950 treaty;

(b) a provision requiring the licensee, as a part of the cost of the project and in cooperation with the agency of the State of New York in charge of the development of parks, to protect the scenic values of the American side of the gorge in a manner similar to that in which they have been safe-guarded on the Canadian side and to construct a scenic drive and park on the American side of the Niagara River near Niagara Falls pursuant to a plan, the general outlines of which shall be approved by the Federal Power Commission;

(c) a provision requiring the licensee to contract, with the approval of the Governor of the State of New York, pursuant to the procedure established by New York law, to sell to the licensee of project 16 for a period ending on the final maturity date of the bonds initially issued to finance the project works herein, specifically authorized, four hundred and forty-five

thousand kilowatts of power, which is equivalent to the amount produced by project 16 prior to June 7, 1956, for the same general purposes for which power from project 16 was utilized and in order to restore as nearly as possible low power costs: *Provided,* That the licensee of project 16 consents to the surrender of its license at the completion of the construction of such project works upon terms agreed to by both licensees and approved by the Federal Power Commission which shall include the following: (i) the licensee of project 16 shall waive and release any claim for compensation or damages from the Power Authority of the State of New York or the State of New York except just compensation for tangible property and rights-of-way actually taken, (ii) without limiting the generality of the foregoing, the licensee of project 16 shall waive all claims to compensation or damages based upon loss of or damage to riparian rights, diversionary rights or other rights relating to the diversion of the use of water, whether founded on legislative grant or otherwise;

(d) a provision giving defense agencies of the United States a preference to purchase power;

(e) a provision requiring a reasonable amount of power to be made available within the project's economic market area in neighboring States to be distributed according to their laws;

(f) a provision requiring that a reasonable amount of the power available in the State of New York and of the power made available in neighboring States under paragraph (e) be allocated for the present and reasonably foreseeable future needs of rural electric cooperatives and municipalities in the project's economic market area.

SHORT TITLE

Sec. 4. This Act may be cited as the "Niagara Development Act of 1957."

Senator Kerr. There will be incorporated in the record at this point letters pertaining to this hearing from the following: Mr. Robert E. Merriam, Assistant Director, Bureau of the Budget; Mr. Robert C. Hill, Assistant Secretary, Department of State; Mr. Wilber M. Brucker, Secretary of the Army; and the reports of the Federal Power Commission.

(The letters referred to follow:)

Executive Office of the President,
Bureau of the Budget.

March 4, 1957.

Hon. Dennis Chavez.

Chairman Committee on Public Works,
United States Senate.

My Dear Mr. Chairman: This is in reply to your letters of January 15 and February 5, 1957, requesting the views of the Bureau of the Budget on S. 512 and S. 1037, to authorize the construction of certain works of improvement in the Niagara River for power and other purposes.

Although these bills differ in certain respects, they both would authorize the Federal Power Commission to issue a license to the New York Power Authority for the redevelopment of the United States share of the waters of the Niagara River. In accordance with the President's recommendation in his recent budget message, we strongly support prompt enactment of legislation which will make it possible to fully develop the hydroelectric power potential of this river.

In view of the need for congressional action to permit redevelopment to go forward and the emergency created by the destruction of part of the generating capacity at Niagara, the Bureau believes that the enactment of S. 1037 would be in the best interests of all concerned, and recommends favorable action on it by the committee. In making this recommendation, we assume that power distribution (other than that specified in the bill) will be made in accordance with New York law.

Sincerely yours,

Robert E. Merriam, *Assistant Director.*

Department of State.
Washington, March 6, 1957.

Hon. Dennis Chavez.

Chairman, Committee on Public Works,
United States Senate.

Dear Senator Chavez: Reference is made to your letter of January 15, 1957, and the reply of this Department dated January 16, 1957, concerning your desire to receive comment on S. 512, a bill to authorize the construction of certain works of improvement in the Niagara River for power and other purposes.

(2) (4) (2)

Nos. 86-735, 86-736, and 86-942

Supreme Court, U.S.
FILED
JAN 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

ALLEGHENY ELECTRIC COOPERATIVE, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

METROPOLITAN TRANSPORTATION AUTHORITY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

RHODE ISLAND PUBLIC UTILITIES COMMISSION AND NEW JERSEY BOARD OF PUBLIC UTILITIES, CROSS-PETITIONERS

v.

METROPOLITAN TRANSPORTATION AUTHORITY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Whether the phrase "neighboring States" in the Niagara Redevelopment Act (NRA), 16 U.S.C. 836, refers solely to Pennsylvania and Ohio or instead refers to all states within "reasonable economic transmission distance" from the Niagara Power Project.

2. Whether Congress, in giving "public bodies" preference status for hydroelectric power under the NRA, intended to limit the preference to publicly owned entities that are capable of selling and distributing power directly to consumers of electricity at retail.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 2

Statement 2

Argument 5

Conclusion 8

TABLE OF AUTHORITIES

Case:

Vermont Pub. Serv. Bd. v. *Power Authority*, 55 F.P.C. 1109 (1976) 3

Statutes:

Boulder Canyon Project Act § 5(c), 43 U.S.C. 617d(c) 6

Niagara Redevelopment Act, 16 U.S.C. 836 *et seq.* 2, 3, 4, 5, 6, 7

16 U.S.C. 836(b)(1) 2

16 U.S.C. 836(b)(2) 2

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-735

ALLEGHENY ELECTRIC COOPERATIVE, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

No. 86-736

METROPOLITAN TRANSPORTATION AUTHORITY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

No. 86-942

RHODE ISLAND PUBLIC UTILITIES COMMISSION AND NEW JERSEY BOARD OF PUBLIC UTILITIES, CROSS-PETITIONERS

v.

METROPOLITAN TRANSPORTATION AUTHORITY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-28a)[1] is reported at 796 F.2d 584. The March 27, 1985, opinion of the Federal Energy Regulatory Commission (the Commission) (Pet. App. 58a-102a) is reported at 30 F.E.R.C. ¶ 61,323 (1985). The Commission's July 30, 1985, opinion on rehearing (Pet. App. 29a-57a) is reported at 32 F.E.R.C. ¶ 61,194 (1985).

[1]"Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 86-735.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1986. A petition for rehearing was denied on August 6, 1986 (Pet. App. 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to the Niagara Redevelopment Act (the NRA), 16 U.S.C. 836 *et seq.*, the Commission issued a license to the Power Authority of the State of New York (PASNY) to construct and operate a power project—the Niagara Power Project (the Project)—utilizing the United States' share of water from the Niagara River. One of PASNY's principal functions is to allocate hydroelectric power generated by the Project. Pet. App. 9a. Under the NRA, PASNY, "in disposing of 50 per centum of the project power," is required to "give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance" (16 U.S.C. 836(b)(1)). Furthermore, in allocating such power, PASNY is required to make a reasonable portion thereof—up to 20 percent (*i.e.*, 10 percent of the Project's total power)—"available for use within reasonable economic transmission distance in neighboring States" (16 U.S.C. 836(b)(2)).

2. The present litigation began in March 1980 when municipal companies in Massachusetts and Connecticut filed complaints with the Commission charging that PASNY had deprived them of their share of the preference power set aside for "neighboring States" under 16 U.S.C. 836(b)(2). In its answer, PASNY acknowledged that Massachusetts and Connecticut qualified as "neighboring States." PASNY indicated, however, that its decision not to sell preference power to those municipalities was permissible because it was already selling a "reasonable" portion of such power to customers outside of New York. PASNY further indicated that the Metropolitan Transportation Authority (MTA),

which is in charge of most mass transit in New York City, was purchasing a portion of the preference power that otherwise would have been sold out-of-state. The Commission consolidated the complaints and it permitted various entities, including the Vermont Department of Public Service (VDPS) and Allegheny Electric Co-operative, Inc. (Allegheny), to intervene in the proceedings. Allegheny's construction, as intervenor, was that "neighboring States" was intended to refer to Ohio and Pennsylvania. In February 1981, the Commission held that Massachusetts and Connecticut, not just Pennsylvania and Ohio, qualified as neighboring states. In addition, the Commission ordered an evidentiary hearing concerning the proper allocation of preference power among the neighboring states. Pet. App. 10a-13a.

On March 27, 1985, after the Administrative Law Judge (ALJ) had completed extensive hearings and had rendered a decision, the Commission entered an order affirming the ALJ in most respects (Pet. App. 15a, 58a-102a). The Commission held that neither the MTA nor the VDPS qualified for preference power because neither was a "public body" (*id.* at 75a-82a). According to the Commission, the term "public bodies" in the NRA means "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail" (*id.* at 80a). Under that definition, MTA failed to qualify because it merely consumed power and did not distribute it; VDPS did not qualify because it did not distribute power itself but simply acted as a wholesale broker to private utilities and municipal systems (*id.* at 80a-82a).[2]

---

[2]In reaching its decision with respect to VDPS, the Commission overruled, in relevant part, its prior decision in *Vermont Pub. Serv. Bd.* v. *Power Authority*, 55 F.P.C. 1109 (1976).

On the question of "neighboring States," the Commission reaffirmed its prior ruling that the phrase "neighboring States" was not limited to Pennsylvania and Ohio (Pet. App. 72a-75a). In the Commission's view (*id.* at 73a), "[b]y interpreting 'neighboring states' according to its usual meaning, we give full effect to Congress' desire to share the benefits of the Niagara project among preference customers throughout the region, but on a limited basis." While the Commission acknowledged that there were several references in the legislative history to Pennsylvania and Ohio, it noted that other states in the region were mentioned as well (*id.* at 74a).

On July 30, 1985, the Commission issued an order on rehearing affirming its March 27, 1985, opinion (Pet. App. 29a-57a).

3. The court of appeals affirmed (Pet. App. 3a-28a). In construing the phrase "public bodies," the court concluded—based on a survey of the legislative history—that Congress enacted the NRA's preference provisions so that municipalities would utilize their supply of hydropower "to charge rates which would force the private utilities to reduce their prices or at least serve as a measure by which regulators could set the private utilities' rate of return" (*id.* at 19a-20a). The court reasoned (*id.* at 20a) that such "[y]ardstick competition" could only be effective if the municipal competitor, like the private utility, actually resold electricity to ultimate consumers. If the public entity used the power itself or sold it to private utilities, the private utilities would face no pressure to reduce the prices they charged their customers (*ibid.*). Applying that interpretation of "public bodies," the court agreed with the Commission that neither MTA nor VDPS was eligible for preference power.[3]

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[3]The court (Pet. App. 23a-24a n.8) also rejected MTA's contentions that the Commission ignored mass transit considerations and violated the environmental laws by not classifying MTA as a preference customer. It noted (*id.* at 24a n.8) that the NRA does not require the

On the meaning of the phrase "neighboring States" under the NRA, the court concluded that there was "no evidence" that Congress intended that phrase "to have any meaning other than its literal one: states found to be within reasonable geographical proximity of New York, taking into account all relevant factors and whether they are within reasonable economic transmission distance" (Pet. App. 24a). The court reviewed the legislative history of the "neighboring States" provision and concluded that, in Congress's view, "economic transmission distances were mutable" (*id.* at 25a). The court noted (*ibid.*) that no congressman had suggested during the debates that preference power "should always be available only to those limited areas which happened to be within economic transmission distance in 1957 [when the NRA was enacted]." The court further cited statements by several congressmen that states other than Ohio and Pennsylvania could receive power if they were within economic transmission distance (*ibid.*). Thus, reasoned the court, since Massachusetts and Connecticut were "within reasonable geographical proximity of New York," the public bodies within those states qualified for preference power (*id.* at 24a).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Review by this Court is therefore not warranted.

Commission "to ignore yardstick competition in favor of subsidizing mass transit * * *." In addition, it noted (*ibid.* (citation omitted)) that, on the environmental question, "Congress' intent controls [and in any event] if MTA's subways were permitted to buy the cheaper hydropower directly (rather than from a distributor of preference power), other customers would then be forced to use the more expensive fuel claimed to pollute the environment."

1. Petitioner Allegheny contends (86-735 Pet. 5-29) that the court of appeals and the Commission erred in holding that the phrase "neighboring States" under the NRA's preference provisions includes Massachusetts and Connecticut. According to Allegheny (*ibid.*), only the States of Pennsylvania and Ohio are encompassed within that phrase.

In the first place, Allegheny's interpretation is contrary to the plain language of the statute. Had Congress intended to designate Pennsylvania and Ohio as the exclusive out-of-state recipients of preference power, it could have—and presumably would have—done so.[4]

Moreover, the legislative history does not support Allegheny's position. As the court of appeals indicated (Pet. App. 25a), while Congress acknowledged that for a period of time only customers in western Pennsylvania and northeastern Ohio would receive preference power, no congressman stated that such power should always be available only to those limited areas. To the contrary, as the court noted (*ibid.*), members of Congress acknowledged that economic transmission distances were mutable.[5]

In sum, both the language and history of the NRA support the interpretation of "neighboring States" adopted by the Commission and the court of appeals.

---

[4]As the Commission noted by way of contrast (Pet. App. 73a n.6), Section 5(c) of the Boulder Canyon Project Act, 43 U.S.C. 617d(c), explicitly specifies a preference for the States of Arizona, California, and Nevada.

[5]Allegheny's claim (Pet. 6) that the court of appeals "fail[ed] * * * to examine or analyze the legislative history presented to it" is patently without merit. As its opinion demonstrates (Pet. App. 24a-26a), the court conducted a thorough examination of the legislative history.

2. Petitioner MTA (86-736 Pet. 11-19) and cross-petitioners (86-942 Cross-Pet. 8-29) assert that the Commission and the court of appeals erred in restricting the phrase "public bodies" to those publicly owned entities that sell and distribute power to ultimate consumers. The court of appeals, however, found that the legislative history convincingly demonstrated that Congress intended the words "public bodies" to refer not to governmental units generally but to public entities that sell and distribute power at retail. As the court pointed out (Pet. App. 20a-21a), the term "public body" was treated in the legislative history as being synonymous with such terms as "municipal utility" or "municipal plant." Moreover, throughout the congressional debates it was implicit that "public bodies" were public entities capable of distributing power (*id.* at 21a). In addition, Congress's purpose in adopting the preference provisions was to promote "[y]ardstick competition." As the court pointed out (*id.* at 19a-20a), such competition would not exist if the public entity used the preference power itself or simply resold it to privately owned utilities. Since the more expansive interpretation of "public bodies" urged by petitioner MTA and the cross-petitioners would contravene Congress's intent, the Commission and the court of appeals properly rejected it.[6]

---

[6]MTA errs in asserting (86-736 Pet. 16-17) that the economic pressure of yardstick competition "is of no value today" and that such competition therefore should not have been relied upon by the court of appeals in construing the statute. Such an argument is properly addressed to Congress, not the courts. There is likewise no merit to MTA's argument that the Commission improperly ignored mass transit and environmental considerations. As the court of appeals recognized (Pet. App. 23a-24a n.8), the NRA does not require the Commission "to ignore yardstick competition in favor of subsidizing mass transit" or to classify MTA as a public body in order to promote environmental interests.

CONCLUSION

The petitions and cross-petition for a writ of certiorari should be denied.

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JANUARY 1987

(3) (3) (3)

Nos. 86-735, 86-736, 86-942

FILED
JAN 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

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ALLEGHENY ELECTRIC COOPERATIVE, INC.,
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Respondents.

METROPOLITAN TRANSPORTATION AUTHORITY,
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METROPOLITAN TRANSPORTATION AUTHORITY,
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BRIEF IN OPPOSITION TO PETITIONS AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	2
REASONS FOR NOT GRANTING THE WRIT	3
CONCLUSION	6

TABLE OF AUTHORITIES

CASES:	Page
Cass v. United States, 417 U.S. 72 (1974)	5
Chemical Manufacturers Ass'n. v. NRDC, 470 U.S. 116 (1985)	5
Chevron U.S.A., Inc. v. National Resource Defense Council, Inc., 467 U.S. 837 (1984)	5
Metropolitan Transportation Authority v. Federal Energy Regulatory Commission, 796 F.2d 584 (2d Cir. 1986)	2,3,4
PASNY v. FERC, 743 F.2d 93 (2d Cir. 1984)	5,6
Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1 (1976)	5
United States v. American Trucking Assns., 310 U.S. 534 (1940)	5
STATUTES:	
Niagara Redevelopment Act, Section 836(b)(1), (2), 16 U.S.C. §§ 836(b)(1), (2)	2,3
U.S. Sup. Ct. Rule 17.1, 28 U.S.C.A.	6
REGULATORY AGENCY OPINIONS:	
Opinion No. 229, Declaratory Opinion and Order Affirming with Modification Initial Decision on Niagara Power Preference for States Neighboring New York, 30 FERC(CCH) ¶ 61,323 (March 27, 1985)	2
Opinion No. 229-A, Opinion and Order on Rehearing Clarifying Declaratory Opinion in Part, and Granting Petitions to Intervene Out of Time, 32 FERC(CCH) ¶ 61,194 (July 30, 1985)	2
OTHER AUTHORITY:	
Murphy, Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Col.L.Rev. 1299 (1975)	5

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BRIEF IN OPPOSITION TO PETITIONS AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTRODUCTION

The New Jersey Preference Boroughs[1], an intervenor-respondent below, submits this Brief in Opposition to Petitions and Cross-Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit by Petitioner Allegheny Electric Cooperative, Petitioner Metropolitan Transportation Authority, and Cross-Petitioners Rhode Island Public Utilities Commission and New Jersey Board of Public Utilities. All three Petitions seek review of various portions of the Second Circuit's decision in *Metropolitan Transportation Authority v. Federal Energy Regulatory Commission,* 796 F.2d 584 (2d Cir. 1986), affirming two opinions issued by the Federal Energy Regulatory Commission, Opinion Nos. 229 and 229-A, 30 FERC(CCH) ¶ 61,323, 32 FERC (CCH) ¶ 61,194. These Opinions interpreted certain provisions of the Niagara Redevelopment Act, 16 U.S.C. §§ 836(b)(1), (2). The common thread running through the Petitions and the Cross-Petition is that the Second Circuit improperly relied upon some or all of the legislative history. The New Jersey Preference Boroughs respectfully suggest to the Court that none of the Petitions or the Cross-Petition present substantive or procedural reasons why this Court should grant the Petitioner's Writs of Certiorari.[2]

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[1] The New Jersey Preference Boroughs consists of the following municipal electric systems in the State of New Jersey: Butler, Lavallette, Madison, Milltown, Park Ridge, Pemberton, South River, Seaside Heights.

[2] For purposes of this Brief, the New Jersey Preference Boroughs adopt the questions presented in each Petition, and the Statement of the Case presented in Allegheny's Petition.

REASONS FOR NOT GRANTING THE WRIT

Allegheny Electric Cooperative, Inc. seeks to have this Court reverse the conclusion of the Second Circuit that the term "neighboring States," 16 U.S.C. § 836(b)(2), should include all states within "reasonable geographic proximity of New York . . . within economic transmission distance." 796 F.2d at 594, at 24a. Allegheny contends that the Second Circuit gave the term a "literal meaning" and consequently failed to fully examine the legislative history which would have resulted in a narrower meaning. Allegheny contends that Pennsylvania and Ohio are the only "neighboring states" entitled to the power made available under section 836(b)(2). The Second Circuit did not "completely ignore" (Petition at 5-6) the legislative history of this term; in fact, the Second Circuit examined the legislative history in detail and reached a conclusion different from Allegheny. 796 F.2d at 594-95, at 24a-26a.

The Metropolitan Transportation Authority seeks to have this Court reverse the conclusion reached by the Federal Energy Regulatory Commission and affirmed by the Second Circuit that "public bodies" under the Niagara Redevelopment Act must be "capable of selling and distributing power directly to consumers of electricity at retail." 796 F.2d at 593, 23a. The MTA does not sell or distribute electricity. Nevertheless, it asserts that a governmental consumer is a "public body" under the Act and therefore, eligible to participate in the allocation of preference power. The MTA contends that the meaning of the term "public bodies" is so clear and unambiguous that it is unnecessary and inappropriate even to look to the legislative history of the Act. This argument, and several

other public policy arguments more appropriately addressed to Congress, were dismissed by the Second Circuit. 796 F.2d at 593-94 n. 8, 23a-24a n. 8.

The Rhode Island Public Utilities Commission and the New Jersey Board of Public Utilities seek to have this Court accept certiorari on the "public bodies" issue presented by the MTA, and to accept a new issue which they call the "state access issue." Reduced to its simplest terms, the Cross-Petitioners are asking the Court to construe the term so as to include a state agency acting as the "bargaining agent" within the class of "public bodies" eligible for preference power even though the state agency has no means of directly selling and distributing power to consumers at retail. Without so stating, the Cross-Petitioners are asking the Court to reverse the Second Circuit's affirmation of the FERC's Opinion that the Vermont Department of Public Service, as constituted prior to 1986, was not a public body "entitled to purchase preference power from PASNY." 796 F.2d at 593 (footnote omitted), 23a.

In support of its position, the Cross-Petitioners complain that the FERC and the Second Circuit should give the term "public bodies" its plain or literal meaning without reference to the legislative history. In support of this proposition the Cross-Petitioners selectively cite portions of this Court's decisions that teach us that statutory construction questions *begin* with the language of the statute itself (Petition at 13-14). Cross-Petitioners conveniently fail to cite to equally relevant cases that state that studying the legislative history is an entirely appropriate and important task in construing a statute. This Court has said:

> When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." *United States v. American Trucking Assns.*, 310 U.S. 534, 543-544 (1940) (footnotes omitted). See *Cass v. United States*, 417 U.S. 72, 77-79 (1974). See generally Murphy, Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Col.L.Rev. 1299 (1975). *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976).

Ironically, after urging that the Second Circuit erred by relying on the legislative history to construe the term, the Cross-Petitioners then proceed to cite partial legislative histories of several federal preference-type acts and selectively delve into the legislative history of the Niagara Redevelopment Act to support its contention that a state agency that is not a seller and distributor of electricity to consumers at retail should be a Niagara Redevelopment Act "public body."

The Cross-Petitioners also argue that certiorari is appropriate because, "By subordinating its own judgment to the Second Circuit's *PASNY* decision, the FERC abdicated its decisional responsibility and ignored this Court's rulings," (Petition at 21), citing *Chevron U.S.A., Inc. v. National Resource Defense Council, Inc.*, 467 U.S. 837 (1984) and *Chemical Manufacturers Ass'n. v. NRDC*, 470 U.S. 116 (1985). Cross-Petitioners' reliance on these cases is misplaced. The FERC did not read *PASNY v. FERC*,

743 F.2d. 93 (2d Cir. 1984) incorrectly, and *PASNY* certainly did not involve the question of deference to an administrative agency.

In summary, the three Petitions ask this Court for another opportunity to argue their case but all three fail to provide compelling reasons for granting writs of certiorari. None of the Petitions can show a conflict between circuits or between state and federal courts over the Niagara Redevelopment Act; none present convincing arguments that the Second Circuit departed from the accepted course of judicial proceedings or failed to follow the rules for statutory construction; none persuasively argue that a federal question has been construed in conflict with applicable decisions of this Court. In summary, the Petitioners and Cross-Petitioners fail to meet any of the threshold criteria outlined in Rule 17.1 of the Supreme Court Rules.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitions and Cross-Petition for Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

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January 21, 1987

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FILED
JAN 21 19
SPANIOL, JR.
CLERK

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Respondent.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MUNICIPAL ELECTRIC UTILITIES ASSOCIATION'S BRIEF IN OPPOSITION TO CROSS-PETITION

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QUESTION PRESENTED

Whether, in view of the attenuated relationship of cross-petitioners to the proceedings below, it would be appropriate at their behest to grant review of the decision below, entered in relation to the Vermont Department of Public Service, which has not sought review, that a state agency which functions not as a distributor of power to consumers, but as a broker to procure preference power for both preference and nonpreference entities, does not qualify as a "public body" within the meaning of the Niagara Redevelopment Act, 16 U.S.C. § 836(b).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF CASE	1
REASONS FOR DENYING CROSS-PETITION	3
CONCLUSION	5

TABLE OF AUTHORITIES

CASES: Page

Aluminum Co. v. Central Lincoln Util. Dist., 467 U.S. 380 (1984) 4

STATUTES:

Niagara Redevelopment Act, Pub. L. No. 85-159, 71 Stat. 401 (1957), § 1(b), 16 U.S.C. § 836(b) (1985) ..... *passim*

Bonneville Project Act of 1937, ch. 720, 50 Stat. 731, § 4, as amended, 16 U.S.C. § 832c (1985) 4

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MUNICIPAL ELECTRIC UTILITIES ASSOCIATION'S BRIEF IN OPPOSITION TO CROSS-PETITION

STATEMENT OF CASE

The case is stated in the segment of the opinion below headed "Background." A4-11. [1]

Among the issues addressed in the proceedings before the Federal Energy Regulatory Commission

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[1] "A" references are to pages so designated in petition of Metropolitan Transportation Authority in Metropolitan Transportation Authority v. Federal Energy Regulatory Commission, Docket No. 86-736 (U.S. filed Nov. 3, 1986).

("FERC") reviewed by the court below was the entitlement of the Vermont Department of Public Service ("VDPS," formerly the Vermont Public Service Board), as then structured, and the Metropolitan Transportation Authority ("MTA") to receive power from the Niagara project out of the portion reserved for preference customers, *i.e.* "public bodies and nonprofit cooperatives." The entitlement of MTA was challenged on the ground it is only a consumer and not a distributor of power. The entitlement of VDPS was challenged on the ground it was, as then structured, only a broker and not a distributor of power, which disposed of a substantial amount of the preference power allocated to it to privately owned utilities.

FERC held that to qualify as a "public body" within the intendment of 16 U.S.C. § 836(b), an entity must be publicly owned and capable of selling and distributing power directly to consumers of electricity at retail and that neither a body like MTA, that is only a consumer of power, nor a body structured as then was VDPS, that was only a broker making preference power available to privately owned as well as to publicly or cooperatively owned utilities, was qualified. A29-30, 65. The court below affirmed. A16, 20.[2]

The cross-petitioners here were permitted to intervene out of time before FERC contemporaneously with the entry by FERC of its final decision after rehearing. The order recites that their admission as

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[2] The court noted that the Vermont legislature undertook to restructure VDPS in 1986 and that the question of its qualification as restructured was not addressed by FERC and was not before the court on appeal. A11.

intervenors shall not be construed as recognition that they might be aggrieved by any order entered in the proceeding and is conditioned on their acceptance of the record as developed prior to their late interventions. A44.

REASONS FOR DENYING CROSS-PETITION

The only parties determined by this case not to qualify as preference customers of Niagara power are VDPS, as formerly structured, and MTA. The qualifications of neither cross-petitioner were in issue or determined. The most they can contend is that, because they deem themselves to be structured similarly to the former VDPS, they apprehend they may be held in the future not to qualify as preference customers under the standards applied to the former VDPS. Their interest in the decision defining "public bodies" is no more than in its effect as precedent.

In addition to being attenuated, the position of cross-petitioners is anamolous. Ordinarily a cross-petition is filed by a party who, but for the fact that another party seeks review, would accept the judgment of the subordinate court but who, in the event the judgment is reviewed, desires to have it reviewed in respects other than as requested by the first petitioner. Grant of review sought by a cross-petition filed beyond the time for an original petition is conditioned upon grant of the latter.

Cross-petitioners here are not essentially satisfied with the judgment below and their cross-petition does not seek to have the judgment reviewed in respects essentially different from the review sought by MTA. They aver only that MTA did not present the public body issue broadly enough. Cross-Petition for a Writ

of Certiorari filed by Rhode Island Public Utilities Commission and New Jersey Board of Public Utilities at 8-9. Acknowledging that their cross-petition cannot be granted unless MTA's petition is, they say "if that petition is granted then this cross-petition must also be granted in order for this Court to consider all of the relevant issues raised by the challenged construction of the term 'public bodies.' " *Id.* Thus, the cross-petition does not "cross" the petition of MTA but undertakes to broaden or supplement it.

Finally, the cross-petition sets forth no reason for its grant other than that the court below erroneously construed "public bodies" as the term is used in 16 U.S.C. § 836(b). The language in the preference provision of the Niagara Redevelopment Act was borrowed from other acts of Congress according preference in the purchase of power from federal hydroelectric projects to public bodies and cooperatives, particularly § 4 of the Bonneville Project Act, 16 U.S.C. § 832c, which makes clear that "public bodies and cooperatives" means such as are engaged in the "public business of selling and distributing" electric power. 16 U.S.C. § 832c(c). The Bonneville Power Administration has consistently construed the preference provisions of the Bonneville Act as permitting sales of preference power only to public bodies and cooperatives operating as utilities. *Cf. Aluminum Co. v. Central Lincoln Util. Dist.*, 467 U.S. 380, 384 n. 4 and text above (1984).

The decision below involves no constitutional question. It does not conflict with a decision of any other court and is consistent with agency interpretations and applications of analogous preference provisions in other statutes.

The issue of whether a political entity, *i.e.*, a state, not engaged in selling and distributing power to consumers qualifies as a "public body" within the meaning of 16 U.S.C. § 836(b) was decided in relation to the Vermont Department of Public Service as structured at the time of the proceedings before FERC. Vermont has not sought review. Cross-petitioners did not enter those proceedings until their conclusion and the issue they would present to this Court was not considered in relation to them below.

CONCLUSION

For these reasons the Cross-Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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January 21, 1987

Supreme Court, U.S.
FILED
JAN 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-942

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RHODE ISLAND PUBLIC UTILITIES COMMISSION, NEW JERSEY BOARD OF PUBLIC UTILITIES,

Cross-Petitioners,

v.

METROPOLITAN TRANSPORTATION AUTHORITY, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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January 21, 1987

QUESTION PRESENTED

Did the Court of Appeals err in determining that States or state governmental entities which sell Niagara Project preference power at wholesale to publicly and privately-owned utilities, which then resell the power at retail to residential customers, are not "public bodies" under Section 836(b)(1) of the Niagara Redevelopment Act, 16 U.S.C. §836(b)(1)?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
REASONS FOR NOT GRANTING THE CROSS-PETITION	3
I. THE DECISIONS BELOW DO NOT VIOLATE THIS COURT'S TEACHINGS ON THE PROPER DECISIONMAKING ROLES OF ADMINISTRATIVE AND JUDICIAL BODIES	5
II. RI/NJ HAVE NOT DEMONSTRATED THE EXISTENCE OF A CONFLICT OR "CONFUSION" REQUIRING RESOLUTION BY THIS COURT	8
III. THE CROSS-PETITION SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT'S ANALYSIS OF BOTH THE NRA'S LANGUAGE AND ITS LEGISLATIVE HISTORY IS CORRECT	9
CONCLUSION	13

TABLE OF AUTHORITIES

Page

Cases:

Bread Political Action Committee v. *FEC*, 455 U.S. 577 (1982) 10

Caminetti v. *United States*, 242 U.S. 470 (1917) 9

Consumer Product Safety Commission v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 10

Harrison v. *Northern Trust Co.*, 317 U.S. 476 (1943) 10

Metropolitan Transportation Authority v. *Federal Energy Regulatory Commission*, 796 F.2d 584 (2d Cir. 1986), *petition for cert. filed*, Docket No. 86-736 (U.S. Nov. 3, 1986) 2, 7, 8, 9,11

PASNY v. *FERC*, 743 F.2d 93 (2d Cir. 1984) 4,5,6,7,8

Phillips Petroleum Co. v. *FERC*, 792 F.2d 1165 (D.C. Cir. 1986) 7

SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) 7

United States v. *Donruss Co.*, 393 U.S. 297 (1969) .. 10

United States v. *Menasche*, 348 U.S. 528 (1955) 11

Regulatory Orders and Opinions:

Opinion No. 151, "Declaratory Opinion and Order Affirming with Modifications Initial Decision on Niagara Preference," 21 FERC ¶ 61,021 (Oct. 13, 1982) 7

Opinion No. 229, "Declaratory Opinion and Order Affirming with Modifications Initial Decision on Niagara Preference Power for States Neighboring New York," 30 FERC ¶ 61,323 (Mar. 27, 1985) 2, 5, 6, 10

Page

Regulatory Orders and Opinions (Cont'd.):

Opinion No. 229-A, "Opinion and Order on Rehearing Clarifying Declaratory Opinion in Part, and Granting Petitions to Intervene Out of Time," 32 FERC ¶ 61,194 (July 30, 1985) 2, 5, 6, 9

State of Vermont Public Service Board v. *PASNY*, 55 FPC 1109 (1976) 4, 5, 6, 7, 8

Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Company, et al. v. *Power Authority of the State of New York*, FERC Docket Nos. EL86-29, *et al.*, "Order Establishing a Hearing, Granting Interventions, Extending the Time for the Filing of Motions to Intervene, Consolidating Proceeding, and Denying Motion to Initiate Enforcement Action," 35 FERC ¶ 61,333 (June 13, 1986) .. 3

Statute:

Niagara Redevelopment Act, Sections 836(b)(1) and (2), 16 U.S.C. §§ 836(b)(1) and (2) ..... *passim*

Legislative Materials:

S. Rep. No. 539, 85th Cong., 1st Sess. (1957) 12

H.R. Rep. No. 862, 85th Cong., 1st Sess. (1957), *reprinted in* 1957 U.S. Code Cong. & Admin. News 1585 12

Supreme Court Rules:

Rule 17.1 3

Rule 20.5 3

Rule 28.1 2

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BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTRODUCTION

This brief is filed by the Massachusetts Municipal Wholesale Electric Company ("MMWEC") and the Connecticut Municipal Electric Energy Cooperative ("CMEEC"), intervenors in the proceedings below and respondents before this Court, in opposition to the cross-petition of the Rhode Island Public Utilities Commission and the New Jersey Board of Public Utilities (collectively referred to as "RI/NJ") for a writ of certiorari. MMWEC and CMEEC represent the interests of entities which have been found to be Niagara Redevelopment Act ("NRA") "public bodies," and are currently receiving allocations of Niagara Project "preference power."[1] NRA

[1] CMEEC and MMWEC, which are political subdivisions of the states of Connecticut and Massachusetts, respectively, serve as bulk power supply agencies for municipal electric distribution system members. MMWEC is composed of 34 member systems; CMEEC is composed of three member systems, known as "Participants." Information concerning

Section 836(b)(1), 16 U.S.C. §836(b)(1), the NRA "preference provision," states in pertinent part that in disposing of 50 percent of the output of the Niagara Project the Power Authority of the State of New York ("PASNY"), the Project licensee, "shall give preference and priority to public bodies and nonprofit cooperatives. . . ."

RI/NJ seek review of that portion of the judgment of the United States Court of Appeals for the Second Circuit in *Metropolitan Transportation Authority* v. *Federal Energy Regulatory Commission*, 796 F.2d 584 (2d Cir. 1986),[2] which held, affirming the determination of the Federal Energy Regulatory Commission ("FERC"), that only publicly-owned entities which are capable of selling and distributing power directly to consumers at retail are NRA "public bodies" and qualify for the purchase of NRA preference power. On the basis of this finding the Commission, and the court, held that the Vermont Department of Public Service ("VDPS"), a state agency which procured NRA preference power from PASNY and sold it at wholesale to publicly and privately-owned utilities for sale and distribution to the utilities' residential customers, was not an NRA "public body." Like the "old VDPS,"[3] the Rhode Island Public Utilities Commission and the New Jersey Board of Public Utilities are state agencies which, as "designated

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the corporate structures of CMEEC and MMWEC, as required by Supreme Court Rule 28.1, is included at p. ii of the Dec. 22, 1986, brief submitted by MMWEC and CMEEC in opposition to the Nov. 3, 1986, petition for writ of certiorari filed by the Metropolitan Transportation Authority ("MTA") in *Metropolitan Transportation Authority* v. *Federal Energy Regulatory Commission*, Supreme Court Docket No. 86-736.

[2] The Second Circuit's opinion is contained in the appendix to the MTA's petition for a writ of certiorari, Supreme Court Docket No. 86-736, at A1-A20.

[3] Following the issuance of FERC Opinion Nos. 229, "Declaratory Opinion and Order Affirming With Modifications Initial Decision on Niagara Preference Power for States Neighboring New York," 30 FERC ¶ 61,323 (Mar. 27, 1985) (MTA Petition Appendix at A49-A85), and 229-A, "Opinion and Order on Rehearing Clarifying Opinion in Part, and Granting Petitions to Intervene Out of Time," 32 FERC ¶ 61,194 (July 30, 1985) (MTA Petition Appendix at A23-A48), the State of

bargaining agents" for their respective states, *see* NRA Section 836(b)(2), 16 U.S.C. §836(b)(2), seek to circumvent the NRA's preference provision by purchasing NRA preference power from PASNY for resale almost exclusively to each state's privately-owned utilities for resale at retail to their residential customers.

MMWEC and CMEEC contend that the cross-petition should be denied for two reasons. First, denial is appropriate because the MTA's petition for certiorari, acceptance of which is a prerequisite for consideration (let alone acceptance) by this Court of RI/NJ's cross-petition, *see* Supreme Court Rule 20.5 and Cross-Petition at 8, is wholly without merit.[4] Second, even if MTA's petition is granted, the cross-petition should be denied because RI/NJ have not demonstrated any special or important reason for the exercise of this Court's discretion as required under Supreme Court Rule 17.1.

REASONS FOR NOT GRANTING THE CROSS-PETITION

RI/NJ allege five reasons (Cross-Petition at 8) why their cross-petition should be granted. First, RI/NJ claim that if the Court grants MTA's certiorari petition, but does not also resolve RI/NJ's "State access" issue, the Court will not be reviewing all facets of the NRA "public bodies" issue. RI/NJ are correct that the issue posed here differs from that posed by

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Vermont passed legislation which purports to transform the VDPS, a power wholesaler, into a retail distributor. The issue of whether or not "new VDPS" is an NRA "public body" is currently before the FERC. *See Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Company, et al.* v. *Power Authority of the State of New York*, FERC Docket Nos. EL86-29, *et al.*, "Order Establishing a Hearing, Granting Interventions, Extending the Time for the Filing of Motions to Intervene, Consolidating Proceeding, and Denying Motion to Initiate Enforcement Action," 35 FERC ¶ 61,333 (June 13, 1986). New Jersey and Rhode Island seek to duplicate the "old," rejected Vermont arrangement.

[4] On December 22, 1986, MMWEC and CMEEC filed a joint brief in opposition to MTA's petition for a writ of certiorari in Supreme Court Docket No. 86-736.

MTA. However, the existence of the difference does not counsel the granting of the cross-petition. The MTA question — whether a public agency which consumes preference power is an NRA "public body" — can be heard and resolved regardless of whether the question raised by RI/NJ — whether a public agency which wholesales power to privately-owned utilities for resale to their residential customers is an NRA "public body" — is heard by the Court.[5] RI/NJ failed to file their own timely petition for certiorari, and cannot bootstrap their request to MTA's by claiming that the two petitions raise issues that must be heard together.

Second, RI/NJ allege (Cross-Petition at 8, 21-26) that in interpreting the NRA phrase "public bodies" the FERC improperly relied upon the Second Circuit's decision in *PASNY* v. *FERC*, 743 F.2d 93 (2d Cir. 1984) ("*PASNY*"), a decision which was itself an affirmance of an earlier FERC opinion on the meaning of the NRA preference provision. MMWEC and CMEEC will demonstrate that FERC's decision to address and apply *PASNY* was correct, and that, contrary to the assertions of RI/NJ, it would have been error for FERC simply to ignore the Second Circuit's decision.

Third, RI/NJ contend (Cross-Petition at 8, 26-29) that Supreme Court review is needed to resolve the conflict between the holding here and FERC's prior *dictum* in *State of Vermont Public Service Board* v. *PASNY*, 55 FPC 1109 (1976) ("*VPSB*") that VDPS was an NRA "public body." MMWEC and CMEEC will briefly rebut this claim by demonstrating that there is no conflict. FERC correctly concluded, upon review for the first time of the evidence relevant to this issue, that the *dictum* in *VPSB* was in error, and that it should be overruled.[6]

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[5] Thus, a major portion of RI/NJ's cross-petition (Section I, at 8-11), which is devoted to explaining the difference between the "State access" issue here and the issue raised by MTA, demonstrates that the cross-petition should be denied rather than granted.

[6] RI/NJ would have this Court believe that whenever a judicial body reverses earlier, erroneous *dictum*, a "conflict" is created.

Finally, RI/NJ claim (Cross-Petition at 8, 12-21) that Supreme Court review is merited because of two errors in the analyses employed by the Second Circuit and the FERC in determining the meaning of the phrase "public bodies." First, RI/NJ contend (Cross-Petition at 12-17) that in interpreting the phrase "public bodies" the Second Circuit and FERC improperly ignored the term's "plain meaning." Second, RI/NJ claim (Cross-Petition at 17-21) that the court misread an unenacted version of the bill which became the NRA. MMWEC and CMEEC will briefly address and refute these erroneous attacks on the decisions below.

I. THE DECISIONS BELOW DO NOT VIOLATE THIS COURT'S TEACHINGS ON THE PROPER DECISIONMAKING ROLES OF ADMINISTRATIVE AND JUDICIAL BODIES

RI/NJ argue at length (Cross-Petition at 21-26) that Opinion Nos. 229 and 229-A, and the Second Circuit's decision affirming the opinions, are "defective" because in reaching its decision the FERC did not independently evaluate the issue in this case. Instead, the Commission "abdicated its decisional responsibility" (Cross-Petition at 21), by basing its opinion entirely upon the Second Circuit's *PASNY* decision. RI/NJ allege (Cross-Petition at 24-26) that FERC's action violates rulings by this Court that agencies must, in the first instance, interpret statutes they are charged with administering.

These contentions are erroneous; as will be shown here, the FERC correctly exercised its decisional responsibility below, and the court properly affirmed the FERC's judgment. Moreover, RI/NJ have misread this Court's rulings. The cases cited by RI/NJ (Cross-Petition at 24-25) refer to the deference due an agency's reading of a statute the agency administers. These cases do not refer to, let alone establish, an agency obligation to interpret a statute while totally disregarding judicial interpretation of the same law.

In Opinion No. 229, the FERC overruled that portion of the *VPSB* decision which determined that the VDPS (then

known as the Vermont Public Service Board) was an NRA "public body."[7] This reversal was necessary because the legal premise underlying the determination in *VPSB*, that the NRA preference provision was designed to insure that power was received by a specific set of customers, *i.e.*, "domestic and rural customers," rather than a specific set of utilities, *i.e.*, consumer and publicly-owned retail distributors, was subsequently held in *PASNY* to be incorrect. 743 F.2d at 105.[8] The legal basis for its prior conclusion having been expressly rejected, FERC was of course obligated to reexamine the "public bodies" issue, and it properly did so. Upon completing its examination, which was conducted independent of the decision in *PASNY*, the FERC concluded that VDPS did not meet the NRA's "public bodies" criteria. As explained by the FERC in Opinion No. 229-A, 32 FERC at 61,450 n.5, MTA Petition Appendix at A28 n.5:

> Thus, while the Second Circuit's opinion dictated the reappraisal [of the *VPSB* decision], the court's decision did not compel us to reach any specific conclusion. Rather, it was our own reevaluation of the statute and its legislative history in this case which dictated the result we reached.

RI/NJ contend that Supreme Court review (and reversal) is required because: (1) the decision that the NRA established a preference on behalf of a type of utility rather than a specified set of "end-users" was in fact made by the Second Circuit in *PASNY* rather than by the FERC; and (2) the FERC improperly chose to apply that decision, rather than blindly sticking to its own earlier pronouncement on the meaning of the NRA preference clause.

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[7] In *VPSB*, the Federal Power Commission did not allocate any of the NRA preference power in question to Vermont. Thus, this determination was *dictum* and could not then be appealed.

[8] FERC (then the Federal Power Commission) concluded in *VPSB* that so long as the VPSB was a public agency, and was insuring that the power was being distributed to rural and domestic customers, it was legally irrelevant that the power was being sold at wholesale to investor-owned utilities for resale to their customers. 55 FPC at 1113.

These arguments are legally and factually untenable. They are legally untenable because, as this Court held in *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943), and RI/NJ note in their cross-petition (at 25), "an order may not stand if the agency has misconceived the law." The *PASNY* decision held that the NRA contained a "federal-type," or utility-oriented preference, rather than an "end-use," or customer-oriented preference. FERC had misconstrued the law in *VPSB* and was obligated to reexamine and, if necessary, overrule the earlier judgment. Had FERC ignored the *PASNY* decision and affirmed *VPSB*, the court in *MTA* v. *FERC* would have been obligated to reverse the Commission consistent with the court's earlier ruling.

The argument is factually untenable because RI/NJ ignore that the Second Circuit's *PASNY* decision on the nature of the NRA preference was itself an affirmance of a prior determination by the FERC. The Commission ruled in Opinion No. 151, "Declaratory Opinion and Order Affirming with Modifications Initial Decision on Niagara Preference," 21 FERC ¶ 61,021 (Oct. 13, 1982), following its first opportunity to review the legislative history, that (contrary to its earlier finding) there is no end-use preference in the NRA. *Id.* at 61,134-35. The Second Circuit affirmed that ruling. *PASNY*, 743 F.2d at 105. By following the ruling in *PASNY*, FERC was simply following its own interpretation of NRA Section 836(b)(1), 16 U.S.C. §836(b)(1), as affirmed by the Second Circuit.

Thus, contrary to RI/NJ's assertions (Cross-Petition at 24), this is not a situation where the court has "preempt[ed]" the agency's decisionmaking role or the agency has ignored that role. Both FERC and the court have properly performed their roles. Nor is this a case like *Phillips Petroleum Co.* v. *FERC*, 792 F.2d 1165 (D.C. Cir. 1986) (Cross-Petition at 24-25). In *Phillips*, the court remanded the matter before it to the FERC because the Commission had erroneously concluded that an earlier decision by this Court resolved the statutory dispute in *Phillips*. 792 F.2d at 1170. In other words, FERC did not err by relying upon a Supreme Court decision to decide a legal issue, but had incorrectly interpreted the holding of that decision. *Id.* at 1170-71. Here, the FERC properly chose to apply a relevant Second Circuit decision, and, unlike *Phillips*, there is no argument that

the FERC misread the Second Circuit's determination. RI/NJ merely contend that both FERC and the Second Circuit were wrong.

II. RI/NJ HAVE NOT DEMONSTRATED THE EXISTENCE OF A CONFLICT OR "CONFUSION" REQUIRING RESOLUTION BY THIS COURT

RI/NJ contend (Cross-Petition at 26-29) that the *MTA* v. *FERC* decision has created two areas of conflict or "confusion" which should be resolved by this Court: (1) the "administrative level" conflict between the Commission's 1976 *VPSB* decision on the "public bodies" issue and the FERC decision below; and (2) the "federal appellate level" conflict between the statutory analysis applied by the Second Circuit in *PASNY* and that applied in *MTA* v. *FERC*. MMWEC and CMEEC will demonstrate here that Supreme Court review is not needed because no such conflicts exist.

As discussed in Section I, *supra*, the FERC fully explained its decision to overrule the *VPSB* finding on the "public bodies" issue. RI/NJ admit (Cross-Petition at 27) that the Commission may reinterpret a statute "if there is a rational basis" for doing so, but argue that such action was "unjustified" here. Here, the basis for the decision is plain: the key legal finding on which the earlier FPC determination was based, *i.e.*, the intended focus of the NRA preference provision, was found (upon review for the first time of all of the relevant evidence) to be incorrect. Absent that legal basis, the ruling in *VPSB* could not be affirmed by FERC without consideration of its own and the Second Circuit's more recent rulings, and it would have been "irrational" and "unjustifiable" for FERC to have done so.

Second, RI/NJ have not demonstrated the presence of any "confusion" between the statutory analyses applied by the Second Circuit in the two cases referred to above. The court's observation in *PASNY* (quoted in the Cross-Petition at 28) as to alternative language which could have been adopted by Congress in drafting the NRA preference clause does not compel

a different result in *MTA* v. *FERC*. The legislative history referred to and the analysis engaged in by the Second Circuit fully support the result reached. The issue before FERC and the court was not what Congress could have written in the preference clause, but what Congress in fact wrote. RI/NJ have not demonstrated that the analysis below of what was enacted by Congress is erroneous.

III. THE CROSS-PETITION SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT'S ANALYSIS OF BOTH THE NRA'S LANGUAGE AND ITS LEGISLATIVE HISTORY IS CORRECT

RI/NJ allege two errors in the Second Circuit's (and the FERC's) analysis of the NRA phrase "public bodies." First, the court erred by looking beyond the "plain meaning" of the statutory language and interpreting the provision in accordance with the NRA's extensive legislative history (Cross-Petition at 12-17); and second, the court misread that history (Cross-Petition at 17-21). Neither contention is correct, and therefore neither justifies Supreme Court consideration of this case.

First, "plain meaning" analysis may be used only where it is demonstrated that such a meaning exists. *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). The FERC found that the "term 'public bodies' is not as unambiguous as the parties suggest." Opinion No. 229-A, 32 FERC at 61,443, MTA Petition Appendix at A29. The accuracy of FERC's position is demonstrated by, *inter alia*, the disagreement among the petitioners themselves as to the statute's "plain meaning." MTA, the granting of whose petition is a prerequisite to a determination of whether or not to hear this cross-petition, contends (MTA Petition at 11) that the statute "plainly means" that any public body in the "literal sense," whether or not capable of distribution to residential customers, is eligible to purchase preference power. RI/NJ claim (Cross-Petition at 15) that so long as the power is sold through a public agency to residential customers, the statutory criteria are being met. Thus, MTA would presumably be ineligible to receive preference power were RI/NJ's "plain meaning" to prevail, while

this Court would be an NRA "public body" if MTA's view were held to be correct. Where the statute's meaning is not "plain," resort to extrinsic aids such as legislative history is "plainly" appropriate. *See, e.g., United States* v. *Donruss Co.*, 393 U.S. 297, 303 (1969).

Second, RI/NJ admit (Cross-Petition at 13) that even where, unlike here, the meaning of statutory language is "plain," this meaning cannot prevail where it violates "a clearly expressed legislative intention to the contrary. . . ." *Bread Political Action Committee* v. *FEC*, 455 U.S. 577, 580 (1982), quoting *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Thus, even if RI/NJ were correct that the NRA term "public bodies" had a "plain meaning," a court would still be justified in examining the legislative history and failing to adopt the "plain meaning" if that legislative history did not support the proposed reading of the language. *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479 (1943).

Here, the Second Circuit and the FERC correctly rejected the "plain meanings" proposed by the parties to this case. MTA's "plain meaning" could not be adopted because, as noted by the FERC, Opinion No. 229, 30 FERC at 61,651, MTA Petition Appendix at A66, MTA's view that any public agency qualifies as an NRA "public body" ignores NRA Section 836(b)(1), 16 U.S.C. §836(b)(1), which embodies a congressional expectation that preference power would be made available for "sale and distribution . . . [to] the people as consumers . . . at the lowest rates reasonably possible. . . ." Similarly, RI/NJ's "plain meaning" would permit the sale of preference power needed by publicly-owned utilities to investor-owned utilities. Such sales are at odds with NRA Section 836(b)(1), 16 U.S.C. §836(b)(1), which states that sales of preference power to "utility companies organized and administered for profit" are permissible only where the power is not needed by legitimate "public bodies," and where such sales are made on a withdrawable basis in order that the preference for "public body" needs can be effectuated. Thus, FERC could adopt neither position, for "plain meaning" analysis does not permit the interpreter to disregard any portion of the statute or reduce

such language to "mere surplusage." *See e.g., United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955). In such a case, the FERC and the Second Circuit properly looked to the legislative history to insure that the provision would be interpreted consistent with congressional intent.

RI/NJ then contend (Cross-Petition at 17-21) that the Second Circuit (and the Commission) misread the legislative history of the statute. In RI/NJ's view (Cross-Petition at 21), the history provides no basis for the conclusion that the term "public bodies" was intended to be limited to publicly-owned retail electric distributors. Instead, RI/NJ argue, on the basis of an analysis of the preference provisions contained in two bills which were *not* enacted, and unsupported assertions as to the bases for congressional compromises,[9] that the legislative history establishes that non-distributor State entities, which function as power conduits to investor-owned utilities, were intended to be NRA "public bodies."

The Second Circuit analyzed the relevant legislative history in detail, 796 F.2d at 591-93, MTA Petition Appendix at A11-A16, and correctly concluded that NRA "public bodies" must be "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." 796 F.2d at 593, MTA Petition Appendix at A16. The court's analysis of that history refutes in full RI/NJ's position, and MMWEC and CMEEC will not reiterate that extensive analysis here.[10]

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[9] *See* the RI/NJ's bald assertion (Cross-Petition at 20) that there "was no intent in Congress to insert in the NRA a stronger municipal preference provision than included in the Clark bill."

[10] As convincing as the Second Circuit's analysis is, there is a great deal of additional, consistent material concerning the nature of the NRA preference and other federal preference laws upon which the court could have relied had it not wished to avoid redundancy. There is no legislative history to support the asserted proposition that preference power earmarked for cooperatives and public bodies can be laundered through a state regulatory agency (such as the petitioners here) and sold to the very privately-owned utilities to which Congress intended to apply competitive pressure.

However, MMWEC and CMEEC would note that RI/NJ, by basing their argument exclusively upon interpretations of two unenacted pieces of legislation, have ignored the Senate and House Reports issued on the bill which actually was enacted as the NRA. Those reports, which describe and discuss the language of the NRA itself, make plain that the FERC and the Second Circuit have correctly analyzed Congress' criteria for qualifying as an NRA "public body." The Senate Report, No. 539, 85th Cong., 1st Sess. (1957), refers (at 6) to a preference for "distributors," and to preference customers as "municipals" and "rural electric cooperatives" (Report at 13; *see* Table contained in the minority report detailing "Estimated demand of preference customers. . . ."). The House Report, No. 862, 85th Cong., 1st Sess. (1957), *reprinted in* 1957 U.S. Code Cong. & Admin. News 1585, refers (at 1593) to a "federal preference policy" on behalf of "public distribution systems."

CONCLUSION

For all of the above reasons, the Court should deny the request for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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January 21, 1987